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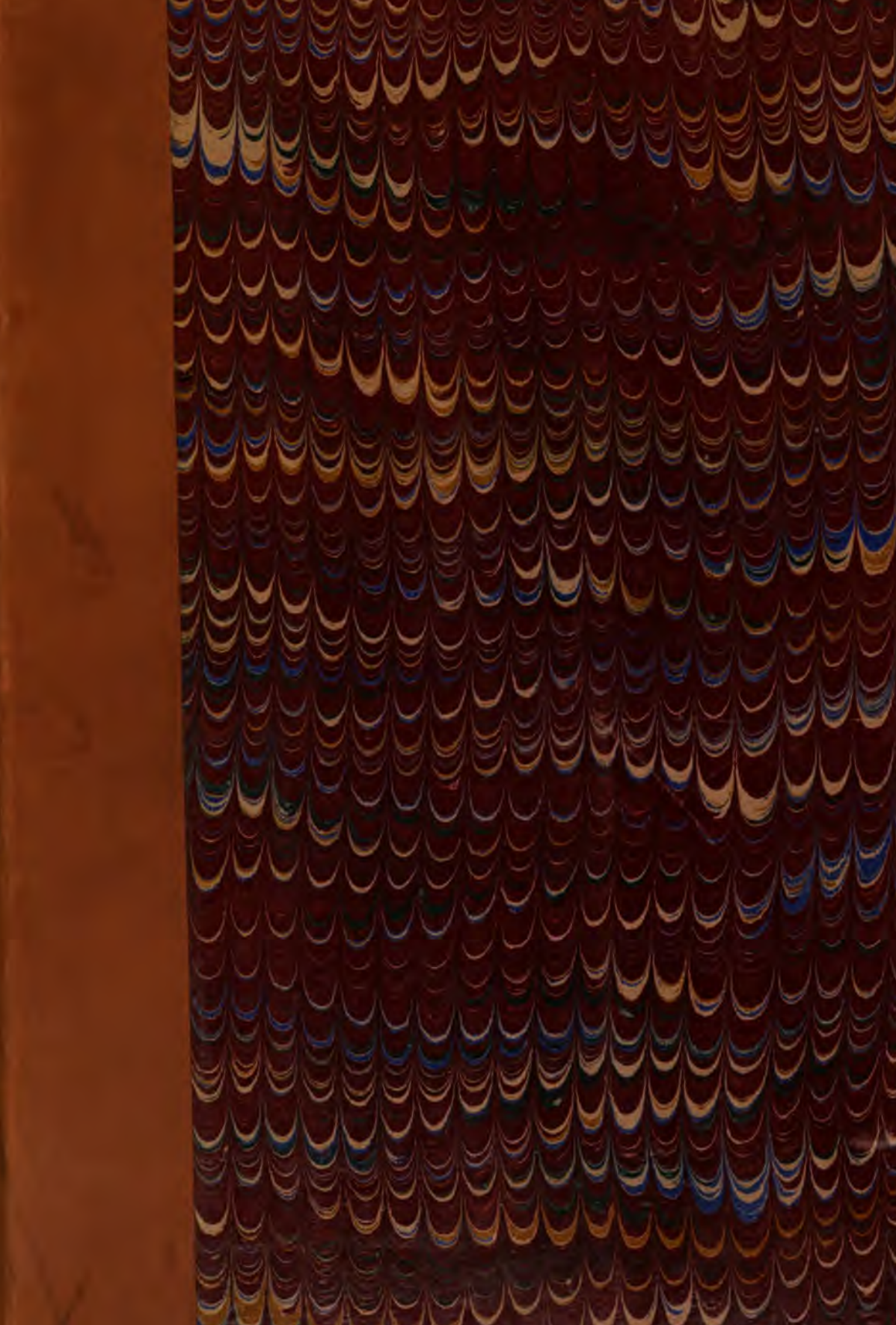
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CANADIAN CRIMINAL CASES

ANNOTATED

A SERIES OF REPORTS OF IMPORTANT DECISIONS IN
CRIMINAL AND QUASI-CRIMINAL CASES IN CAN-
ADA UNDER THE LAWS OF THE DOMINION AND
OF THE PROVINCES THEREOF, WITH SPE-
CIAL REFERENCE TO DECISIONS UNDER
THE CRIMINAL CODE OF CANADA,
1906, IN ALL THE PROVINCES;
WITH ANNOTATIONS, A
TABLE OF CASES CITED
AND A DIGEST OF
THE PRINCIPAL
MATTERS

EDITED BY
W. J. TREMEEAR,
OF THE TORONTO BAR

VOL XX

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Canadian Criminal Cases.

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

[HALIFAX COUNTY COURT, NOVA SCOTIA.]

BEFORE HIS HONOUR W. B. WALLACE, COUNTY JUDGE, SITTING AS AN EXTRADITION COMMISSIONER.

UNITED STATES v. WEBBER.

(Decision No. 1.)

1. EXTRADITION (§ I—4)—INTERNATIONAL—STRICT COMPLIANCE WITH TECHNICALITIES OF CRIMINAL PROCEDURE—GOOD FAITH OF APPLICANT.

Where two countries have enacted criminal legislation to prevent a certain crime, in respect of which extradition proceedings are instituted in manifest good faith by one of such countries, too much regard should not be paid by the other country in such proceedings to the ordinary technicalities of criminal procedure; and extradition may be ordered notwithstanding a discrepancy between the date of the alleged offence in the information and the date proved by the evidence.

2. BANKRUPTCY (§ VI—31)—FOREIGN BANKRUPT—FRAUDULENT CONCEALMENT OF ASSETS—UNITED STATES LAW—CONCEALMENT PRECEDING BANKRUPTCY PROCEEDING.

The essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy and the appointment of a trustee, whose title relates back to the date of the adjudication, and extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of the adjudication.

3. EVIDENCE (§ XII L—995)—SUFFICIENCY OF PROOF TO JUSTIFY ISSUANCE OF A WARRANT OF COMMITTAL FOR EXTRADITION.

The evidence to warrant a committal for extradition need not be such as to justify a conviction at the trial. A *prima facie* case only need be made.

4. EXTRADITION (§ I—4)—BANKRUPTCY OFFENCE—FRAUDULENT CONCEALMENT OF PROPERTY—CONTINUING OFFENCE.

The offence of fraudulent concealment of property by a bankrupt committed in the United States of America and for which extradition may be had from Canada is a continuing offence which may be begun before the date of the bankruptcy adjudication and continued to completion thereafter.

DECIDED: July, 1912.

HARRY and Coppel Webber were charged at Halifax before His Honour Judge W. B. Wallace with offences against the bankruptcy laws of the United States, the former for that he did on the 12th day of December, A.D. 1911, conceal assets from his trustee in bankruptcy, the latter with aiding and abetting in said offence. It appeared from the depositions and oral evidence adduced that the fraudulent acts of secretion and removal of goods were committed in October and November, 1911, the bankruptcy proceedings instituted December 12th and the trustee elected March 19th, 1912.

At the close of the case for the United States Government,

Mellish, K.C., moved for the dismissal of the complaint on the ground that on December 12th, the date charged in the information no trustee had been elected or was in existence and consequently no crime had been committed as charged.

W. J. O'Hearn, contra, contended that the commissioner was not bound by the date of the information or complaint before him, but could commit for any extraditable offence disclosed by the evidence citing Seager's Magistrates' Manual, 1st ed., p. 205, sec. 18 (a) Extradition Act; *Re Garbutt* (No. 1), 21 O.R. 179; *United States v. Harsha* (No. 2), 11 Can. Cr. Cas. 62; and *Re Gaynor and Green* (No. 11) (1905), 10 Can. Cr. Cas. 154, 160.

JUDGE WALLACE, County Court Judge, ruled that he was not bound by the date in the information but could commit for any extraditable offence disclosed by the evidence.

H. Mellish, K.C., and *J. B. Kenny*, for the fugitives:—In order to warrant commitment for surrender, facts must disclose offence under law of demanding country. Evidence here shews "concealment" done in October and November. This before trustee was appointed. Impossible to commit offence until trustee appointed. See *Cohen v. United States*, 157 Federal Re-

porter 651, and *Radin v. United States*, 189 Federal Reporter 568. They also tendered depositions for the defence.

W. J. O'Hearn, for the United States Government:—The evidence shews the commission of an offence against 29(b) United States Bankruptcy Act. The essence of the offence is the *failure* to come forward when the *trustee* is elected and disclose the goods misapplied or the proceeds. Concealment can commence before bankruptcy. See *Cohen v. United States*, 157 Federal Reporter, at p. 651. The evidence here shews a *prima facie* case. That is all that is necessary. Any doubt as to the facts must be resolved in favour of surrender. See *Ex parte Feinberg*, 4 Can. Cr. Cas. 270, at 275. Depositions for the defence are not admissible as evidence except in the cases mentioned in sec. 15 of the Extradition Act. See *In re Garbutt* (No. 2), 21 Ont. R. 465.

HALIFAX, July, 1912.

WALLACE, Extradition Judge:—The charge against the defendant Harry Webber is that on or about the twelfth day of December, 1911, being then a bankrupt in Lawrence, Massachusetts, he did fraudulently conceal from his trustee in bankruptcy certain goods and money belonging to his estate in bankruptcy.

Counsel for the accused contends that there is no evidence to sustain this charge and that, therefore, the accused should be discharged. It appears that the adjudication of bankruptcy did not take place until February, 1912, and that the trustee in bankruptcy was not appointed until March, 1912. It is, therefore, urged that the accused could not conceal goods in December from a trustee who was not appointed until the following March. I consider the information defective, so far as the date of the commission of the alleged offence is concerned, as, in order to commit the offence there must be an existing trustee. But, where Canada and the United States have enacted criminal legislation to prevent a person from defrauding his creditors, by fraudulently concealing any of his property, and where, as

in this case, the extradition proceedings are manifestly instituted in good faith by the demanding country, too much regard should not be paid to the ordinary technicalities of criminal proceedings. If the evidence in this case tends to prove the offence as having been committed at a later period than the date alleged in the information I am not justified in dismissing the case because of the defect in the information.

Dealing then, with the law and facts, it appears that under United States law the fraudulent concealment which is a violation of the statute is a continuing offence, and may be begun before bankruptcy and continue to completion after adjudication of bankruptcy. Naturally a bankrupt who intended to commit the fraudulent act would usually make some preparations to that end some time before the adjudication of bankruptcy. A bankrupt who misapplies goods of the estate before the actual adjudication of bankruptcy and fails to come forward subsequently to disclose and turn over such goods or their proceeds to the trustee in bankruptcy, and whose conduct tends to shew that he is hiding the property or its proceeds from the trustee thereby commits acts which might sustain a charge of fraudulent concealment within the meaning of section 29(b) of the United States statute. Although a person cannot actually commit this offence until he has been adjudged a bankrupt he may previously contemplate and prepare for the commission of the offence and his acts during that earlier period are admissible in evidence. The essence of the offence is the continuance of the concealment after adjudication of bankruptcy and after the appointment of the trustee, whose title relates back to the date of the bankruptcy adjudication.

Applying the law to the facts in this case I find that there is evidence of a secreting of property before bankruptcy and a subsequent failure to turn over such property or its proceeds after adjudication of bankruptcy and after the trustee was appointed, and such evidence tends to sustain a charge of fraudulent concealment within the meaning of section 29(b) of the

United States bankruptcy law. The requirements of the extradition law having been in other respects fulfilled, and there being sufficient evidence to justify a committal of the accused, a warrant for his committal will be issued.

Certain depositions were tendered by counsel on behalf of accused to explain acts of the accused when carrying on business in Lawrence, Massachusetts. I refuse to receive these depositions as I am not trying the guilt or innocence of the accused, but am merely considering whether the evidence given by the prosecution is sufficient to justify his committal for trial.

In the case against Copel Webber (alias Charles Webber), the charge is that the accused did aid and abet Harry Webber, a bankrupt, in fraudulently concealing from Harry Webber's trustee in bankruptcy certain property belonging to Harry Webber's estate in bankruptcy. If this charge were established by evidence the defendant, under Canadian, as well as United States law, would be guilty, as a principal. The evidence, however, in this case is much weaker than in the case against Harry Webber, and in the trial of a case of this kind exclusively on such evidence the accused would be entitled to be discharged. He is not shewn to have been a partner of Harry Webber, or to have participated in any way in the profits of the business, and some of his acts which, under other circumstances, might tend to shew guilty knowledge are consistent with the acts of an ordinary employee carrying out the instructions of an employer, and not necessarily having any knowledge of any criminal purpose on the part of the employer. But I am not to try the case, and I find that the depositions of Miss Frances Lyons, when combined with the other facts in the case constitutes sufficient evidence to justify the committal of the accused for trial.

Committal for extradition.

N.B.—See the next following case.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

UNITED STATES v. WEBBER.

(Decision No. 2.)

1. EVIDENCE (§ VII H—632)—EXPERT'S OPINION ON FOREIGN LAW—CONSTRUCTION OF FOREIGN STATUTE.

A question as to the law of a foreign jurisdiction is one of fact and not of law, and the Court should therefore accept the opinion of an expert in the foreign law in preference to its own upon the construction of a statute of the foreign jurisdiction.

2. HABEAS CORPUS (§ I C—12c)—REVIEW OF EXTRADITION COMMITMENT—FUNCTION OF JUDGE—REASONABLE GROUNDS FOR SUSPICION.

The function of a judge upon the return of a writ of *habeas corpus* in the case of one who has been committed for extradition is not to sit in appeal from the Extradition Commissioner, but simply to decide whether he had jurisdiction to order the committal, and evidence offering reasonable grounds of suspicion against the accused will be sufficient for a refusal of his discharge.

DECIDED: August 9, 1912.

THE prisoners were committed for surrender to the United States Government on charges against bankruptcy laws, the former on a warrant accusing him of having between the 1st day of October, A.D. 1911, and the 31st day of March, A.D. 1912, while a bankrupt, concealed property from his trustee in bankruptcy, the latter on a warrant charging him with aiding and abetting in said crime. Drysdale, J., issued a writ of *habeas corpus* and the prisoners were produced before Ritchie, J., in Chambers and the above warrants returned, the evidence being brought before the Judge by *certiorari*.

H. Mellish, K.C., and J. B. Kenny, for the applicants:—
There is no sufficient evidence of criminality against the accused. The evidence shews that the suspicious conduct of accused took place in October and November, A.D. 1911. The trustee was not elected until March, 1912. Demanding Government must shew prisoners had goods or money in March, 1912, at time trustee was elected. "Concealment" while possibly begun before bank-

ruptey must continue after. No evidence of continuation here. See *Cohen v. United States*, 157 Fed. Rep. 651; also *Radin v. United States*, 189 Fed. Rep. 568; also *Re Adams*, 171 Fed. Rep. 599. If *prima facie* case not made out, *habeas corpus*, Judge will discharge. See *United States v. Harsha* No. 1, 10 Can. Cr. Cas. 433. Facts here in both cases do not shew offence under American statute.

W. J. O'Hearn, for the United States Government:—The only question on this application is, was there any evidence before the Commissioner.* The question of its sufficiency cannot be considered. See *R. v. Maurer*, 10 Q.B.D. 513; *Ex parte Huguet*, 29 L.T.N.S. 41; *In re Arton*, No. 2, [1896] 1 Q.B. 509; *Ex parte Sibeth*, 51 W.R. 191; *Ex parte Seitz*, No. 1, 3 Can. Cr. Cas. 56, and *United States v. Browne*, No. 2, 11 Can. Cr. Cas. 174.

Whether the facts constitute an offence under the American statute is a question of foreign law, and as such is a question of fact for the Commissioner. The Commissioner has accepted the evidence of Mr. Garland the legal expert and found on it. There being evidence to support his finding it will not be disturbed in *habeas corpus*. See *Re Collins*, No. 3, 10 Can. Cr. Cas. 90; Phipson on Evidence, p. 359; *Ex parte Huguet*, 29 L.T.N.S. 41; *Ex parte Piot*, 15 Cox C.C. 213. Relationship is a fact for the jury. See *R. v. Chapple and Bolingbroke*, 17 Cox C.C., p. 455.

HALIFAX, August 9, 1912.

RITCHIE, J.:—The offence with which the accused persons are charged is a violation of the United States bankruptcy law.

The statutory enactment in question is as follows:—

A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offence of having knowingly and fraudulently concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy.

*The decision of His Honour W. B. Wallace, County Judge, sitting as an extradition commissioner is reported, *United States v. Webber*, Decision No. 1, 5 D.L.R. 863, 20 Can. Cr. Cas. 1, ante.

If I had to decide on the true construction of this statute, I would have very great difficulty in holding that the offence could be committed before the accused was put into bankruptcy and before the appointment of the trustee. My opinion is against the construction, but the statute is passed in a foreign jurisdiction and an expert from that jurisdiction has testified that the offence may arise before the bankruptcy arises and before the trustee is appointed. I think that the question of what the law is in a foreign jurisdiction is a question of fact and not a question of law for me, therefore I feel bound to accept the evidence of the legal expert from the United States.

The only remaining question which I have to decide is not whether there is sufficient evidence to convict these men, but is there any evidence against them proper to be submitted to a jury? I have no doubt there is such evidence against Harry Webber, the case against Copel Webber is much weaker, but I cannot say there is no evidence offering reasonable grounds of suspicion. I think there is some slight evidence of this character. I am not sitting as an appeal Judge from Judge Wallace, the learned Extradition Commissioner; my function as I understand it is to decide whether or not he had jurisdiction to make the order. After a careful consideration of the evidence, I am of opinion that there was jurisdiction to make the order, and therefore refuse the application for discharge.

Discharge refused.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE PRENDERGAST, J., IN CHAMBERS.

THE KING v. JOHNSON.

1. HABEAS CORPUS (§ IC—13a)—SUMMARY CONVICTION—POLICE MAGISTRATE'S POWERS.

A summary conviction by a city police magistrate under the vagrancy clauses, Cr. Code R.S.C. 1906, ch. 146, secs. 238 and 239, may be quashed for irregularity on proceedings in *habeas corpus* and *certiorari* in aid taken on behalf of the defendant committed under such summary conviction, and is, in that respect, distinguishable from con-

victions made by city police magistrates for indictable offences under their extended jurisdiction under Cr. Code sec. 777.

[*Rex v. McEwen*, 13 Can. Cr. Cas. 346, 7 Man. L.R. 477, distinguished.]

2. SUMMARY CONVICTION (§ III—21)—DEPOSITIONS—OMISSION TO SWEAR STENOGRAPHER.

The omission of the magistrate on the trial of a summary conviction matter to swear the stenographer before taking the evidence, is a matter of substance and goes to the jurisdiction of the magistrate so as to invalidate a conviction.

[*Rex v. L'Heureux*, 14 Can. Cr. Cas. 100, followed.]

DECIDED: March 6, 1912.

MOTION on *habeas corpus* and *certiorari* in aid, following a summary conviction of the defendant upon a charge that she did unlawfully, being a common prostitute or night-walker, wander in the streets of the city of Winnipeg, not giving a satisfactory account of herself when called upon to do so, and is thereby a loose, idle, and disorderly person and a vagrant.

The grounds of objection taken in the summons were:—

1. That the information and conviction were bad, in that they disclosed no offence in law.
2. That the magistrate did not, before the stenographer took the evidence, first administer the oath to the said stenographer that he would truly and faithfully report the evidence, as required by statute.
3. That there was no evidence to support the conviction.

The conviction was quashed and the prisoner was discharged from custody.

P. E. Hagel, for the prisoner.

R. B. Graham, for the Crown.

WINNIPEG, March 6, 1912.

PENDERGAST, J.:—I overrule the preliminary objection to the application based on 31 Car. 11. ch. 2, sec. 2. *Rex v. McEwen*, 13 Can. Crim. Cas. 346, 7 Man. L.R. 477, deals only with convictions by a Police Magistrate exercising the extended jurisdiction to try indictable offences summarily, and not with summary convictions. It has been the constant practice of this Court to deal with such matters as this one on application for

habeas corpus—as in *The King v. Pepper*, 15 Can. Crim. Cas. 314, and in *Rex v. Barnes*, 21 Man. L.R. 357, 18 W.L.R. 630. See also *Rex v. Leschinski*, 17 Can. Crim. Cas. 199, 19 W.L.R. 602, and the comment therein on *The Queen v. St. Clair*, 3 Can. Crim. Cas. 551, as to the original jurisdiction of the Court of King's Bench in England and of this Court.

On the first ground urged for the applicant, I hold that the information and conviction disclose a criminal offence under sec. 233, (i) of the Criminal Code.

As to the second objection, that the stenographer was not sworn, as required by sec. 683, I uphold the same; and, adopting the views of Craig, J., in *Rex v. L'Heureux*, 14 Can. Crim. Cas. 100, 8 W.L.R. 975, I hold this to be fatal. There are then no valid depositions, there is no valid evidence to support the conviction; and this, of course, is not a mere matter of form or procedure, but one of jurisdiction.

The conviction will be quashed, and the prisoner discharged from custody.

Prisoner discharged.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE GARROW, MACLAREN, MEREDITH, MAGEE, JJ.A., AND
LENNOX, J., AD HOC.

THE KING v. HONAN.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—ABSOLUTE JURISDICTION.

A person charged under secs. 227 and 228 Criminal Code, 1906, ch. 146, with keeping a common betting house, may without his consent, under secs. 641, 773 and 774 of the Code, as amended by 8 and 9 Edw. VII., be summarily tried by a police magistrate, absolute jurisdiction to try such offence without a jury having been conferred upon such official by secs. 641, 673, and 674 of the Cr. Code, 1906.

[*Rex v. Lee Guey*, 13 Can. Cr. Cas. 80, 15 O.L.R. 235, specially referred to.]

2. EVIDENCE (§ V—510)—ARTICLES OBTAINED UNDER SEARCH WARRANT—REGULARITY OF WARRANT.

Upon a trial for keeping a common betting house in violation of secs. 227 and 228 of the Criminal Code, R.S.C. 1906, ch. 146, articles for recording bets which were seized upon the premises by police offi-

cers, are admissible in evidence against the prisoner, irrespective of a claim by the accused that the alleged search warrant was illegal and that the police officers had obtained possession of the articles by means of their own trespass.

[*Rea v. White* (1908), 15 Can. Cr. Cas. 30, 18 O.L.R. 640, specially referred to.]

DECIDED: June 18, 1912.

CASE stated by George Taylor Denison, Esquire, Police Magistrate for the City of Toronto, as follows:—

“On the 28th February, 1912, John Honan and Thomas Honan were charged before me, upon an information charging that the said John Honan and Thomas Honan, in the month of February, 1912, at the City of Toronto, in the County of York, did, contrary to law, keep a common betting-house at No. 125 Jarvis street, contrary to sec. 227 of the Criminal Code; upon which charge the said accused asked leave to exercise their right to elect to be tried by a jury, which I refused, upon the ground that my jurisdiction to try the accused was absolute without their consent. The defendants thereupon pleaded ‘not guilty’; and I thereupon proceeded to try them summarily upon the charge aforesaid.

“On the said 28th February, 1912, upon hearing the evidence submitted on behalf of the Crown—the accused not having given or tendered any evidence in their defence—I found them both ‘guilty’ of the offence with which they were charged, and I convicted them accordingly, and sentenced them each to pay a fine of \$10 and costs or to imprisonment for thirty days in the common gaol.

“Upon the arraignment of the accused before me on the said 28th February, they (by their counsel) submitted that they could exercise the right to elect to be tried by a jury upon the charge aforesaid, and stated that they desired to exercise such right and wished to be tried by a jury; but I ruled that the accused had not the right to elect to be tried by a jury, and that I had absolute jurisdiction and right under secs. 227 and 228 and clause (f) of sec. 773 and sec. 774 of the Criminal Code to try the accused sum-

marily without their consent; and I, accordingly, refused the accused the right to elect.

"Upon the trial of the said accused before me, there was tendered on behalf of the Crown evidence consisting of certain articles marked as exhibits 1, 2, 3, and 4, which are forwarded herewith, and are made part of this stated case, as evidence against the accused. The said exhibits, according to the evidence, had been seized, as it was alleged, under the provisions of sec. 641 of the Criminal Code, by certain police constables of the City of Toronto, who entered the premises of the accused; and the said exhibits were, under the provisions of secs. 641 and 642 of the Code, tendered as evidence against the accused upon the charge aforesaid; and I admitted the said exhibits as such evidence, against the objection of counsel for the accused that the provisions of secs. 641 and 642 had not been complied with.

"It appeared by the evidence that the chief constable of the City of Toronto, and also the deputy chief constable, were in the city on the 13th February, 1912 (the day upon which the police constables referred to in the next preceding paragraph entered the premises of the accused and seized the said exhibits), during the whole day, and acted in the performance of their duties, but that the seizure of the exhibits aforesaid was not made by them or under their direction, or by or under the direction of either of them, but was made by an inspector of police—a police constable named George Kennedy—or under his direction, neither the chief constable nor the deputy chief constable being present.

"Counsel for the accused objected to the admission of the said exhibits as evidence against the accused, upon the ground that my warrant or order purporting to authorise George Kennedy, police inspector, to act in the absence of the chief constable and deputy chief constable, was wrongfully and improvidently issued, in that the persons designated by the statute were not absent, as provided by the statute, and that the seizure of the articles marked as exhibits 1, 2, and 3, was not made by or under the direction of the chief constable or the deputy chief constable aforesaid, or of any other person authorised under sec. 641 of the Criminal

Code to make such seizure; but I overruled this objection, and admitted the said exhibits as evidence against the accused.

"At the request of counsel for the accused, I hereby reserve the following questions of law for the opinion of the Court of Appeal:—

"1. Had I the right to refuse to allow the accused to elect to be tried by a jury, and to try them summarily, without their consent?

"2. Had I the right, under the provisions of sec. 641, to authorise George Kennedy, a police inspector, to act in the absence of the chief constable and deputy chief constable, they being in the city attending to their ordinary police duties on the day of such authorisation and seizure?

"3. Was I right in admitting as evidence against the accused the exhibits hereinbefore mentioned so seized?

"The report in writing of the chief constable for the City of Toronto to me, the information and complaint before me, the warrant or order or authority issued by me pursuant to the said report, the conviction of the accused, and the evidence, including the said exhibits, are forwarded herewith and made part of this stated case."

The report of the chief constable, addressed to the Police Magistrate, was in these words: "I have the honour to report to you that there are good grounds for believing and I do believe that a building occupied by John Honan, in the City of Toronto, is kept or used as a common betting-place; and I hereby apply for authority to proceed against the said premises under secs. 641 and 642 of the Criminal Code."

The authority signed by the Police Magistrate was as follows: "I hereby authorise George Kennedy, police inspector of the City of Toronto, deputed to act in the absence of the chief constable or deputy chief constable of said city, to enter the above-named premises and to proceed against the same under the provisions of secs. 641 and 642 of the Criminal Code."

George Kennedy, sworn as a witness at the trial of the accused, produced the articles marked as exhibits, referred to in the case,

which, he deposed, were found on the person of John Honan and upon the premises. They were slips and racing forms and other papers apparently used for the purpose of recording bets.

Section 227 of the Criminal Code, R.S.C. 1906, ch. 146, defines a common betting-house.

Section 228, as amended by 8 & 9 Edw. VII. ch. 9 (schedule), provides: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house or opium joint, as hereinbefore defined."

Section 641: "If the chief constable or deputy chief constable of any city . . . or other officer authorised to act in his absence, reports in writing to . . . the Police . . . Magistrate . . . that there are good grounds for believing and that he does believe that any house, room or place within the said city . . . is kept or used as a common . . . betting-house, as defined in section . . . 227 . . . such . . . Police . . . Magistrate . . . may, by order in writing, authorise the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house . . . and to take into custody all persons who are found therein, and to seize . . . all tables and instruments of . . . betting . . . and to bring the same before the person issuing such order, or any Justice, to be by him dealt with according to law . . ."

Section 773, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"Whenever any person is charged before a magistrate,— . . .

"(f) with keeping a disorderly house under section 228 . . .

"the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way."

Section 774, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

"2. The provisions of this Part do not affect any absolute summary jurisdiction given to Justices by any other Part of this Act."

T. J. W. O'Connor, for the defendants, argued that the Police Magistrate had not the right, under secs. 773 and 774 of the Code, to refuse the accused a trial by jury. Prior to the amendments made in 1909, this was settled by *Rex v. Lee Guey* (1907), 13 Can. Cr. Cas. 80, 15 O.L.R. 235, following *The Queen v. France* (1898), 1 Can. Crim. Cas. 321; and the amendments in question do not give the magistrate the jurisdiction which he has claimed in this case. The magistrate had no right, under sec. 641, to authorise the inspector to seize the articles marked as exhibits, as the chief constable and his deputy were not "absent" within the meaning of the section; and, as the exhibits were illegally seized, the magistrate was not authorised to use them as evidence: Roscoe's Crim. Evid., 13th ed., pp. 195, 196; *The Queen v. Lushington, Ex p. Otto*, [1894] 1 Q.B. 420.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown, argued that the amendments to secs. 773 and 774, made by 8 & 9 Edw. VII. ch. 9, gave the magistrate the absolute jurisdiction which he had assumed, and that he had not erred in admitting the evidence in question: *Ex p. Cormier* (1909), 17 Can. Crim. Cas. 179.

TORONTO, June 18, 1912.

The judgment of the Court was delivered by

MEREDITH, J.A.:—The purpose of the amendments to secs. 773 and 774, made in the year 1909, was to make those sections applicable to such a case as this and others of the same character: to change the law in this respect from that which this Court had then recently, and a Quebec appellate Court had long before, held it to be, to that which in those cases it was contended for the Crown that it was: and the only question now is, whether Parliament has sufficiently expressed that purpose in the language used in making the amendments.

In the plainest words possible, it has made sec. 773 cover such a case as this; that is unquestionable; but it is urged that the change made in sec. 774 is not sufficient for that purpose. In that contention I am quite unable to agree.

Section 773 enumerates in detail the charges which a "magistrate" may hear and determine in a summary way; and plainly included in them is the charge in question in this case, which is described as keeping a disorderly house under sec. 228; and that section, in plain terms, comprises any common bawdy-house, common gaming-house, or common betting-house, as in previous sections defined.

Then sec. 774 proceeds to make the jurisdiction of the magistrate, conferred upon him by sec. 773, "absolute" in the case of keeping a disorderly house; that is, in the case of keeping a disorderly house, as set out in the preceding section conferring the jurisdiction, that jurisdiction is to be absolute; and the remodelling of sec. 774, in respect of inmates and frequenters, makes it quite plain also that, in framing these amendments, due regard was had to that which was, in these respects, pointed out in the case of *Rex v. Lee Guey*, 15 O.L.R. 235, 13 Can. Cr. Cas. 80, to which I have already adverted.

So that, in my opinion, the charge in this case is clearly one covered by sec. 774 as well as 773, as amended in the year 1909: 8 & 9 Edw. VII. ch. 9 (schedule); and, therefore, the "magistrate" had "absolute" jurisdiction.

Nor can I think that the magistrate erred in admitting the evidence objected to; the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected, because it was obtained by means of a trespass—as it is asserted—upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the "jimmy" or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to "set

a thief to catch a thief:" see *Rex v. White* (1908), 18 O.L.R. 640, 15 Can. Cr. Cas. 30.

This disposes of the first and third questions adversely to the accused, and makes it unnecessary to consider the second; though I may add that, if magistrates will endeavour to give to the plain words of statutes their plain meaning, without letting that which may or may not suit their conveniences, or that which in their narrower environments may seem to be a better law, sway them, they will not find much difficulty in pursuing the right course.

Convictions affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE KING v. WOODROOF.

1. CRIMINAL LAW (§ II A—38)—NECESSITY OF READING OVER TO, AND HAVING WITNESS SIGN DEPOSITION—CRIM. CODE 1906, SEC. 682.

The requirement of sub-section 4 of section 682 of the Criminal Code, R.S.C. 1906, ch. 146, that the depositions of a witness shall be read over to him by the magistrate, and signed by him, is directory only, and the omission to comply with this requirement does not involve loss of jurisdiction.

2. JUDGES (§ III—23)—ADMINISTRATION OF JUSTICE—DISQUALIFICATION—SUSPICION OF INTEREST OR BIAS.

In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, no person who is to take part in it should be in such a position that he might be suspected of being biased.

[*Allinson v. General Medical Council*, [1894] 1 Q.B. 750, followed.]

3. JUSTICE OF THE PEACE (§ I—4c)—DISQUALIFICATION—BIAS—POSSIBILITY.

In order to disqualify a magistrate from acting, on the ground of bias, it is not necessary to shew that he is in fact biased, but only that he is in such a position that he might be biased.

[*Reg. v. Gaisford*, [1892] 1 Q.B. 383; and *Reg. v. Huggins* (No. 2), [1895] 1 Q.B. 563, followed.]

4. OFFICERS (§ II C—88a)—BARGAINING IN REFERENCE TO ADMINISTRATION OF OFFICE.

No judicial officer should make a bargain in regard to anything connected with the administration of his judicial office.

5. JUSTICE OF THE PEACE (§ I—4c)—DISQUALIFICATION—REASONABLE APPREHENSION OF BIAS.

One who is appointed stipendiary magistrate by a municipality at an annual salary, on the condition that he shall try all cases under the Canada Temperance Act, and shall make monthly reports, returns and payments to and for the use of the municipality of all fines, penalties and forfeitures collected by him as such magistrate on account of such cases, is disqualified from hearing a prosecution under the Act, inasmuch as there is a reasonable apprehension that he may be biased.

DECIDED: September 19, 1912.

MOTION on notice to the prosecutor who is the inspector for the town of Yarmouth, Nova Scotia, for enforcing the Canada Temperance Act on the return to orders in the nature of writs of *habeas corpus* and *certiorari* in aid thereto under chapter 181 of the Revised Statutes 1900, "Of securing the liberty of the subject" for an order to discharge Ida Woodroof from the common jail at Yarmouth where she was confined under a warrant of commitment in execution signed by C. Curtis MacKay, an additional stipendiary magistrate for the said town dated August 14th, 1912, reciting a conviction of that day for a third offence of unlawfully selling intoxicating liquors, etc., at Yarmouth, contrary to Part II. of the Canada Temperance Act and for which she was sentenced to three months' imprisonment.

The convicting justice was appointed an additional stipendiary magistrate for the town by the Lieutenant-Governor of Nova Scotia in council on Oct. 23rd, 1911, under R.S.N.S. 1900, ch. 33, as amended by Act (N.S.) 1905, ch. 11, sec. 2, and on February 29th, 1912, the town council of Yarmouth passed the following resolution and the justice accepted his salary under it and acted on its terms:—

Resolved, that additional stipendiary magistrate C. Curtis McKay be granted an annual salary of four hundred dollars (\$400.00) on condition that he pays all fees of his said office to the town, and also on condition that he do and shall try all cases under the Canada Temperance Act which may be laid before him by the inspector appointed by this council to enforce and carry out the provisions of said Act, and also on condition that he do and shall make monthly reports and returns and payments to and for the use of the said town of Yarmouth of all fines from whatever source collected by or paid to or

collectable by or payable to him as such additional stipendiary magistrate of the said town of Yarmouth, and further do and shall make monthly reports and returns and payments to and for the use of the said town of Yarmouth of all fines, penalties and forfeitures, and other moneys coming to him from whatever source, and collected by or paid to or collectable by or payable to him as such additional stipendiary magistrate of the said town of Yarmouth, and payable by him as such to the said town of Yarmouth by reason of or through or on account of any proceedings, actions, informations or complaints laid, taken, heard or tried and any conviction made, or judgment given thereon, by and under the authority of the Criminal Code, the Canada Temperance Act, the Towns Incorporation Act, and the amendments of such Acts, and any other statutes and Acts of Canada and of Nova Scotia from time to time in force in Canada and in the province of Nova Scotia, and any of the by-laws and ordinances of the town of Yarmouth, orders-in-council of Canada, orders-in-council of Nova Scotia or any other authority whatever.

The Act (N.S.) 1905, ch. 11, sec. 2, is as follows:—

One or more additional stipendiary magistrates may be appointed for cities or incorporated towns who shall receive the prescribed fees, but any city or town council may at any time by resolution, grant to any such additional stipendiary magistrate an annual salary and receive such fees or any portion thereof as part of the revenue of the town.

Criminal Code section 1133 (1) and (2) provides as follows:—

(1) Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September, and December in each year, make to the clerk of the peace or other proper officer of the Court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants.

(2) Such return shall include all convictions and other matters not included in some previous return, and shall be in form 75.

By orders-in-council (D) dated the 29th September, 1886, and November 15th, 1886, all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city, county or incorporated town which has adopted the said Act, which would otherwise belong to the Crown, for the public uses of Canada, are paid to the treasurer of the city or county, as the case may be, for the purposes of the Act.

The Nova Scotia Temperance Act, 1910, ch. 2, sec. 57 (1) and (4), is as follows:—

(1) In every municipality in which the second part of the Canada Temperance Act is in force or hereafter comes into force, the council of such municipality shall annually appoint one or more persons to be called inspectors, for the purpose of enforcing and carrying out the provisions of such Act, and shall fix a salary of not less than one hundred dollars, to be paid to each such inspector by the municipality.

(4) Every municipality in which such inspector is appointed under this section is authorized to pay out of the funds of such municipality, all costs, charges and expenses of enforcing and carrying out the provisions of the Canada Temperance Act.

The prisoner was discharged and an order for the protection of the jailor and sheriff was made.

J. J. Power, K.C., and J. A. Grierson, for the motion.

W. E. Roscoe, K.C., for the prosecutor, contra.

HALIFAX, September 19, 1912.

RITCHIE, J.:—The defendant is imprisoned for a violation of the Canada Temperance Act and seeks to be discharged under *habeas corpus* on two grounds. The first ground is that the depositions were not read over to the witnesses and signed by them as provided for by sub-section 4 of section 682 of the Code. It is claimed that the omission to comply with the statute in this regard goes to the jurisdiction. Section 682 of the Code is made applicable to cases under the summary convictions part of the Code, and it is the duty of the magistrate to read over the depositions and have them signed by the witness. Not to do so is to disobey the clear direction of the statute. The effect of a disregard of the statutes in this regard has been the subject of judicial decision in Canada, the point in issue being whether the omission goes to the jurisdiction or whether the statute is merely directory and not attended with the penalty of loss of jurisdiction. There are authorities both ways and after a careful consideration of the cases I have come to the conclusion that the sound view is that the statute is directory and loss of jurisdiction is not involved. This point must in my opinion fail. I can see strong reasons for the statute and I do not come to the con-

elusion which I have indicated without some doubt. So far as the magistrate is concerned it ought to be sufficient for him that the statute requires a thing to be done.

The second point raised is that in consequence of the terms under which the magistrate is paid by the town council as disclosed by the resolution of the 29th of February, 1912, the magistrate might not unreasonably be suspected of bias. The rule on this point is laid down by Lord Esher, in *Allinson v. General Medical Council*, [1894] 1 Q.B. 750, as follows:—

In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that *he might be suspected* of being biased.

It is not necessary in order to support the contention made by the defendant that the magistrate should have been in fact influenced.

Mathew, J., in *The Queen v. Gaisford*, [1892] 1 Q.B. 381, 383, said:—

In order to disqualify a magistrate from sitting, on the ground of bias, it was argued on his behalf that it was incumbent on the complainant to shew that the justice was in fact influenced, but in my opinion, it is sufficient to shew as was held in *Reg. v. Milledge*, 4 Q.B.D. 332, that he might have been influenced, for in such a case, it is not likely that a magistrate should knowingly be under the influence of an improper bias, although he may be placed in such a position as to be influenced, or to *run the risk* of being influenced unconsciously to himself in his decision.

The resolution and the magistrate acting under it constitutes a bargain between the town and the magistrate in regard to the performance of his judicial functions. This is an exceedingly novel, and in my opinion, an improper state of affairs. It must certainly be clear that no judicial officer should make a bargain in regard to anything connected with the administration of his judicial office. It is of the greatest importance in the administration of justice by stipendiary magistrates that there should be no ground for reasonable apprehension of anything like bias in the magistrate because appeal is taken away

by statute. It is important that the Canada Temperance Act and all other laws should be enforced, but nothing is more important than absolute confidence on the part of the public in the pure administration of justice. The magistrate is appointed by the Governor-in-council to perform the duties required of him by statute, the town council may grant him an annual salary by resolution and receive his fees or a portion thereof, but the council has no authority to prescribe by resolution how he shall perform his judicial duties. The town council is interested in the fines paid by violators of the Canada Temperance Act. As I have said, the question is not has the magistrate been influenced or done anything improper in this particular case, but is his position (in the words of Lord Esher) "such that he might be suspected of being biased," or in the words of Mr. Justice Matthews does he by reason of his position "run the risk of being influenced unconsciously to himself"? In *The Queen v. Huggins* (No. 2), [1895] 1 Q.B. 563, at page 565, Mr. Justice Wills said:—

Here there is no question of Martin having had any pecuniary interest, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias.

Take a case to be tried before stipendiary McKay, of Yarmouth, which is a close one, evidence both ways apparently equally reliable or take a case where the weight of evidence inclines in favour of the defendant, and judgment is in favour of the prosecution, might not an independent man have reasonable apprehension that the magistrate was influenced by his position perhaps unconsciously—he might not unreasonably say here is a Judge who is under contract with the town council, which is interested in the results, to try all the Scott Act cases, to make returns which the law does not require him to make so that the town may know whether the payment of \$400 a year is good business for the town. If by mistake or otherwise, he fails to make a return, he is in the hands of the town council as to whether he will get his salary or not. I think a man might

reasonably have such an apprehension of bias as I have indicated; as a matter of fact there might be no bias, but the administration of justice is brought into disrepute. It is of comparatively little importance, whether this defendant remains in gaol for the balance of her term, but it is impossible to overrate the importance of having the administration of justice command the respect of the public.

I decide that the defendant must be discharged. I have not arrived at this conclusion without considerable doubt and difficulty, but I am very confident that it is in the best interests of the administration of justice that there should be no bargains or contracts of any kind in regard to the performance of judicial duties between the stipendiary magistrates of the province and the town councils or any other corporation or person.

*Order for discharge with protection
to jailor and sheriff.*

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, AND
MAGEE, J.J.A.

THE KING v. WRIGHT.

1. SHIPPING (§ IV—20)—OFFENCES—FALSE STATEMENT OF SERVICE ON APPLICATION FOR MASTER'S CERTIFICATE.

The offence of making a false representation for the purpose of obtaining a certificate of competency as master of a passenger steamer under the Canada Shipping Act, R.S.C. 1906, ch. 113, is negatived if it appears that there was no guilty knowledge or intent on the part of the accused and that the only error in his application papers was that believing that service as second mate counted in like manner as would service as first mate, he represented that he had served as mate "on a certain boat for a year whereas a part of the time had been served as second mate and the remainder as mate (i.e., first mate), particularly where the examining officer when called as a witness testified that he would have passed the applicant's papers had the actual facts been shown.

2. SHIPPING (§ IV—20)—OFFENCES—CERTIFICATE OF SERVICE—INCORRECT STATEMENT IN CERTIFICATE OF DISCHARGE.

A certificate of discharge furnished by the master of a ship to the second officer under sec. 176 of the Canada Shipping Act, R.S.C. 1906,

ch. 113 (Form K.) is not a certificate of service within section 123 of that Act making it an offence for a person to fraudulently make use of a certificate of service to which he was not entitled.

DECIDED: March 19, 1912.

CASE stated by the Senior Judge of the County Court of the County of York upon the acquittal of the defendant after trial upon a charge of offences against the Canada Shipping Act.

Both questions submitted were answered in the affirmative. Messrs. *J. Jennings*, and *H. C. Macdonald*, for the Crown. *H. H. Dewart*, K.C., for the defendant.

MOSS, C.J.O.:—The defendant, having been committed for trial by the Police Magistrate for the City of Toronto upon charges preferred against him in the Police Court, and being in close custody, duly elected to be tried by a Judge without a jury, pursuant to the provisions of the Criminal Code in that behalf. He was thereupon tried by His Honour Judge Winchester, Senior Judge of the County Court of York, presiding in the County Court Judge's Criminal Court, upon a charge-sheet containing two counts: first, that he fraudulently made use of a certificate of service to which he was not justly entitled, contrary to the Canada Shipping Act, R.S.C. 1906 ch. 113; and, second, that he made a false representation for the purpose of obtaining for himself a certificate of competency, contrary to the Canada Shipping Act. The date of the commission of the alleged offences was stated to be the 12th March, 1910.

The learned Judge found the defendant "not guilty" of either of the offences charged; but, at the request of counsel for the prosecution, stated a case under the provisions of the Criminal Code in that behalf, reserving two questions, viz.: "1st. Upon the evidence, was I right in holding that the use made by the defendant of the document which he presented to the examiner of masters and mates at Windsor was not an offence under the first count above set out? 2nd. Upon the evi-

dence, was I right in law in holding that the defendant did not make such a false representation as to constitute an offence under the second count above set out?"

These charges were laid under sec. 123 of the Canada Shipping Act, the first charge having relation to sub-head (d) and the second to sub-head (a). The effect of these is to declare guilty of an indictable offence any person who—(a) makes, procures to be made, or assists in making, any false representation for the purpose of obtaining for himself or for any other person any certificate of competency or of service; or—(d) fraudulently makes use of any such certificate which is forged, altered, cancelled, or suspended, or to which he is not justly entitled.

It would have been more convenient if the order in which the counts are set out in the charge-sheet had been reversed so as to correspond with the order of the sub-heads of sec. 123 under which they are framed. And, inasmuch as the second count charges a violation of the provisions of sub-head (a), it is convenient to consider it first and to deal with the first count last.

The defendant, a sailor on the inland waters of Canada and the holder of a certificate of competency to act as mate on a ship trading on the inland waters of Canada, made application to Mr. W. F. McGregor, the official examiner at Windsor for the Department of Marine and Fisheries, to be examined for a certificate of competency as master of a passenger steamer on inland waters. A printed form of application issued by the Department was furnished him by the examiner, who filled in some of the particulars. The defendant filled in the remainder, signed it, and returned it to the examiner on the 12th March, 1910.

Accompanying the application were three other documents:—

(a) A certificate of discharge for seamen according to form K in the schedule to the Act, signed by the master of the

steamer "Iroquois," stating, among other particulars, the following:—

CAPACITY.	DATE OF ENTRY.	DATE OF DISCHARGE.
1st Mate.	April 25th, 1908.	December 8th, 1908.

(b) A testimonial dated the 9th December, 1909, signed by the master of the steamer "W. D. Matthews," stating that the defendant was second mate on the "W. D. Matthews" from the 26th April to the 14th August, and first mate from the 15th August to the 9th December, 1909.

(c) A testimonial dated the 8th March, 1910, signed by the master of the steamer "Stormount," stating that he knew the defendant for the past few years as second mate of the steamer "Algonquin" and as mate of the "Iroquois" and the "Matthews." All these documents give him a good character for ability, conduct, sobriety, trustworthiness, and competence. In setting out the application the particulars of testimonials of service he gave the following:—

SHIP'S NAME.	RANK.	DATE OF COMMENCEMENT.	DATE OF TERMINATION.	TIME IN SUCH SHIP.
1. Iroquois.	Mate.	April 25, 1908.	Dec. 8, 1908.	{ 7 months, 13 days.
2. W. D. Matthews	2nd Mate	April 26, 1909.	Aug. 14, 1909.	{ 3 months, 18 days.
3. " "	Mate.	August 15, 1909.	Dec. 9, 1909.	{ 3 months, 24 days.

The defendant was duly examined by the examiner, as required by the Shipping Act, and obtained a certificate of competence as a master.

The charge against him on the second count is, that, in the application and papers produced by him, he made a false representation for the purpose of obtaining the certificate. The gravamen of the charge is, that he represented that he had

served as mate for a year, when in fact he had not served for that length of time, and that he made the representation knowing it to be false and for the purpose of deceiving the Department into granting him a certificate of competency. The learned Judge, who heard the testimony of the witnesses, including that of the examiner and of the defendant, completely exonerated the latter from the charge of fraudulently or knowingly making any false representations; and, upon the whole evidence, he was justified in coming to that conclusion. There is no doubt that in one sense the statement in the certificate of discharge as to the capacity in which the defendant served on the "Iroquois" is not strictly correct. It represents the defendant as serving as first mate during the whole season of 1908, whereas during the greater portion of the time he was serving in the capacity of second mate. But, at the time the discharge was given and for some time before, he was the first mate of the "Iroquois." According to a literal construction of the Shipping Act, only one officer known as a mate is recognised on inland vessels. But, as the evidence shews and the learned Judge found, in actual practice there are officers serving under and next to mates who are called second mates, or probably in the passenger steamers second officers, as distinguished from mates or first officers. These persons not infrequently perform the duties or some of the duties of the mate or first officer. This appears to have been recognised by the examiner, who testified that, if the certificate had shewn the period of service on the "Iroquois" to be partly as first mate and partly as second mate, but covering the period stated, he would have accepted it. It is to be borne in mind, also, that, before shipping on the "Iroquois" for the season of 1908, the defendant had obtained and was the holder of a certificate of competence as mate, so that during that season he was actually qualified to perform, and to a considerable extent throughout the season did perform, the duties of a mate. The defendant, who seems to have given his testimony in a fair and straightforward manner, swore that the certificate of discharge was drawn up, signed, and handed to him

by the master of the "Iroquois" without any request or suggestion as to its contents; that, when he read it, he saw it was incorrect, because he was not first mate all the time, but he did not know that there was only one person recognised under the law in Canada on the inland waters as mate—in other words, none but first mate—and that he considered that second mate's service under a certificate of competency as mate counted. In this view he appears to be supported by the examiner.

Upon all the facts, the learned Judge found that the defendant was not guilty of falsely intending to misrepresent the facts, and that there was no intent on his part to make use of the certificate of discharge as a false representation.

It is, of course, a matter of public importance and concern that there should be no evasion of the provisions of the Shipping Act in regard to any of its particulars, and especially so in regard to the competency and skill of those to whom the safety of lives and property are intrusted; and that, where wilful fraud and misrepresentation are proved to have been practised, punishment should follow.

But where, as here, even the examiner, to whose judgment the question of proper service was committed by the Department, was unable to see any infraction of the law in what was done in this case, it could hardly be expected that the learned Judge should decide otherwise than he did.

The second question should, therefore, be answered in the affirmative.

The first question is readily answered. The first count charges the defendant with fraudulently making use of a certificate of service to which he was not justly entitled, and is laid under sub-head (d) of sec. 123. The certificate there referred to is plainly either the certificate of competency or of service referred to in sub-head (a).

The certificate of discharge under sec. 176, form K, is an entirely different document from the certificate of service referred to in sub-head (a) of sec. 123.

The certificate of competency there spoken of is plainly the document provided for by secs. 82-84, inclusive; and the connection renders it equally plain that the certificate of service spoken of is the document provided for by secs 85-91, inclusive.

It is against the fraudulent use of "such certificate" that sub-head (d) is directed. The production to the examiner of the certificate of discharge was, therefore, no offence against this provision of the Shipping Act; and there was no proof of the first count in the charge-sheet.

The first question should also be answered in the affirmative.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., for reasons stated in writing, agreed in the result. He said that the defendant obtained a master's certificate to which he was not entitled, and obtained it upon untrue statements in writing given by him for the purpose of obtaining such a certificate. But, by reason of the finding of fact exculpating him from a guilty knowledge of the wrong which he perpetrated, he must go free of the criminal law, however he might fare elsewhere.

MAGEE, J.A., wrote an opinion in which he stated that he fully agreed that the questions should both be answered in the affirmative, and for the reasons above given. He added that he had been unable to find anything in the Canada Shipping Act, or the Regulations thereunder, to indicate that, for the purpose of obtaining a certificate of competency as master for inland waters, service in the capacity of second mate, by a person having a certificate of competency as mate, is not as effective as service in the capacity of first mate. This view was enforced by references to the Act and the Regulations.

Questions answered in the affirmative, and Crown's appeal dismissed.

[COURT OF APPEAL FOR MANITOBA.]

BEFORE HOWELL, C.J., RICHARDS, PERDUE, CAMERON, AND
HAGGART, J.J.A.

THE KING v. LAUGHTON.

1. CONSTITUTIONAL LAW (§ II 8—283)—MUNICIPAL BY-LAW OR REGULATION
SUPERSEDED BY CRIMINAL LAW STATUTE.

To rescue cattle from the custody of a poundkeeper while he is taking the cattle to the pound is a criminal offence in Manitoba by virtue of the Imperial statute 6 & 7 Vict. ch. 30 there in force (Cr. Code of Canada 1906, sec. 12), and the provisions of that statute supersede the provisions of any municipal by-law purporting to impose penalties for the like offence.

2. MUNICIPAL CORPORATIONS (II A—32)—LEGISLATIVE POWERS—BY-LAW AS
TO OFFENCE ALREADY MADE CRIMINAL.

A municipal by-law is *ultra vires* where it purports to provide a penalty for the identical offence which is already subject to penalty under a provision of the criminal law.

3. POUNDS (§ II—20)—POUND BREACH—RESCUE OF ANIMALS BEING IM-
POUNDED.

The Imperial statute 6 & 7 Vict. ch. 30, making it a criminal offence to rescue from a poundkeeper cattle which are in his lawful custody is a part of the criminal law in force in Manitoba by virtue of section 12 of the Criminal Code of Canada 1906, declaring that the criminal law of England as of 15 July, 1870, shall be the criminal law of Manitoba in so far as such English law is applicable and in so far as it has not been repealed, modified, or affected by English or Canadian legislation.

DECIDED: October 7, 1912.

APPLICATION to quash a conviction.

The defendant, Clifford Laughton, was fined \$27.50 by a justice of the peace of the municipality of Assiniboia for unlawfully rescuing thirty head of cattle from the pound master of the municipality while the cattle were in the lawful custody of such pound keeper of the municipality and being conveyed by him to No. 5 pound as provided by the by-laws of the municipality of Assiniboia.

An application was made to quash the conviction on the ground that the charge was not laid before two justices of the peace and was not heard before two justices of the peace as required by 6 & 7 Vict. (Imp.) ch. 30, one justice of the peace having no jurisdiction respecting the charge; that the by-law

was *ultra vires* of the municipality of Assiniboia inasmuch as it contained a clause imposing and providing a penalty for rescuing animals from a pound, or while being conveyed to a pound, and the statute did not grant the municipality power to pass any such by-law in respect of the offence; which, being a criminal matter, the province had no power to give the municipality jurisdiction to deal with.

The conviction was quashed.

H. F. Tench, for the applicant.

J. E. O'Connor, K.C., and *C. Isbister*, for the magistrate and pound keeper.

WINNIPEG, October 7, 1912.

THE COURT:—The Court quashed the conviction, holding that the charge and conviction were of a criminal nature, and that under the Imperial statute of 6 & 7 Vict. ch. 30, which makes it a criminal offence to rescue cattle being taken to a pound, the charge could not be dealt with by one justice sitting alone.

Conviction quashed.

[COURT OF SESSIONS OF THE PEACE FOR QUEBEC CITY.]

BEFORE THE HONOURABLE G. LANGELIER, J.S.P.

THE KING v. COULOMBE.

1. TRADEMARK (§ IV—20)—BEVERAGE TRADE-MARK—RE-LABELLING OF BOTTLES—CRIM. CODE 1906, SEC. 655.

Section 655 of the Crim. Code, 1906, does not make it obligatory upon the magistrate to hear witnesses before issuing a warrant or summons for an infraction of Crim. Code, sec. 490, as to the unlawful use of beverage trademarks and trade-names, if, after having issued a search warrant, the return of the constable shews that a large quantity of bottles, bearing the trademark of an opposition company, had been seized in defendant's possession with his own label added.

2. CRIMINAL LAW (§ II C—52)—MAGISTRATE HEARING WITNESSES PRIOR TO ISSUING A WARRANT—CRIM. CODE 1906, SEC. 655.

The magistrate may, under Crim. Code, sec. 655, hear witnesses for his own information upon the application for a warrant.

[*Ex parte Coffon*, 11 Can. Cr. Cas. 48, specially referred to.]

3. INDICTMENT, INFORMATION AND COMPLAINT (§ II D—22)—MORE THAN ONE PARTICULAR ACT INCLUDED IN STATEMENT OF THE OFFENCE—VALIDITY OF SUMMONS—CRIM. CODE 1906, SEC. 490.

The particular acts referred to in the sub-secs of sec. 490 of the Crim. Code 1906, are the ingredients of the single offence of the unlawful use of a beverage trade-mark and the fact that more than one of such particular acts is included in the statement of the offence as contained in an information or summons, does not invalidate such information or summons.

4. TRADEMARK (§ IV—20)—UNLAWFUL USE OF A BEVERAGE TRADE-MARK ON BOTTLES—MENS REA.

Some offences require a criminal intent, *mens rea*, but that rule does not apply to all criminal offences and in particular does not apply to the offence under sec. 490 of the Crim. Code, of unlawfully using a beverage trade-mark on bottles.

[*R. v. Beckwith*, 7 Can. Cr. Cas. 450, specially referred to.]

DECIDED: September 14, 1912.

TRIAL of a charge of using the trade-mark of another upon bottles contrary to sec. 490 of the Crim. Code 1906.

The facts of the case were as follows: Coulombe is a ginger ale manufacturer; he used in his trade, bottles upon which the names of other firms were blown and permanently affixed, filled the said bottles with his own ginger ale, labelled the same with his label and placed them upon the market for the purpose of sale.

It was admitted by the defence that the trade-mark upon the bottles was duly registered. The defendant admitted having used those bottles, but he had received them through his driver in exchange for his own bottles in the course of his trade.

A. Galipeault, K.C., for complainant.

A. Corriveau, K.C., for defendant.

QUEBEC, September 14, 1912.

LANGELIER, J.:—The defendant is sued in virtue of sec. 490 of the Crim. Code, sub-secs. (a) and (b). Before pleading

to the merits, his attorney made two motions to have the summons dismissed, in which it was alleged:—

Firstly, that before issuing the summons the magistrate should have heard witnesses to ascertain the truth of the complaint;

Secondly, that the summons contained several different offences.

As to the first objection, before issuing the summons, the magistrate had issued a search warrant and the return of the constable shewed that one hundred dozen bottles, with the label of other manufacturers, were found in the possession of the defendant, which was a sufficient justification to issue even a warrant.

In the case of a summons, the magistrate is not obliged to hear witnesses before issuing it. The doctrine on this point is clearly laid down in Daly's Criminal Procedure, p. 114:—

It is the duty of a justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which suspicion and belief are founded and to exercise his own judgment thereon.

An information stating in general terms that the informant has reason to believe and did suspect and believe that the party charged had committed an offence without stating the grounds of his information, and apparently without making them known to the magistrate, will not authorize a justice to issue a warrant in the first instance.

That question of the distinction between a summons and a warrant has been dealt with by the Supreme Court of New Brunswick in the case of *Ex parte Coffon*, 11 Can. Cr. Cas. 48.

Chief Justice Tuck, in delivering the decision of the Court, expressed as their opinion, what had been decided in *Ex parte Boyce*, 24 N.B.R. 347, namely:—

A sworn information that the complainant has just cause to suspect and believe that the party has committed a specified offence will not authorize a justice to issue his warrant to arrest in the first instance. It is the duty of the justice, before issuing a warrant, to examine on oath the complainant or his witnesses as to the facts upon which suspicion and belief are founded, and to exercise his own judgment thereon.

The distinction is easy to understand: the magistrate must take his precautions before ordering to arrest a person. The English law protects the liberty of the subject and he cannot be deprived of it except upon serious grounds.

The second objection complained that the summons contained several different offences.

In criminal procedure the summons or indictment is equivalent to the action in civil law: the offence must be indicated in such a manner as to shew to the defendant clearly the offence he is accused of having committed, and which he is called upon to answer. Upon that point I will quote Daly's Criminal Procedure, p. 130:—

An indictment should describe the offence charged with such particularity as will inform the accused of the specific acts for which he is called upon to answer. An indictment which merely stated the offence in the language of the statute and did not set out the particular facts constituting the offence, was quashed: *Rea v. Beckwith*, 7 Can. Cr. Cas. 450.

See also the same author, at p. 128, about information.

In the information the charge must be set out in such distinct terms that the accused may know exactly what he has to answer: see *R. v. Beckwith*, 7 Can. Cr. Cas. 450.

Finally, our own Court of Queen's Bench, in *Regina v. France*, 1 Can. Cr. Cas. 321, has affirmed the same principle:—

An information should give a concise and legal description of the offence charged and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence.

I will also refer to sec. 723, sub-sec. 3, of our Crim. Code which says:—

The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or, any similar words, shall be sufficient in law.

See also sec. 854 of the Crim. Code.

What was the offence in the present case? It was the use of the trade-mark of another firm to sell his own products. The information discloses only one offence with the ingredients

which constitute it in law, and the summons concludes to one offence and one penalty. The two motions are dismissed.

Now let us come to the merits of the case. The offence has been clearly proved; but the learned counsel for the defence invoked the good faith of his client; he says that he had no guilty mind, *mens rea*.

In general, to constitute a crime, the criminal intent must exist; however, the rule is not inflexible. In many cases the law makes criminal the commission of acts although the accused had no intention to violate the law, so if one breaks a law or a by-law concerning public health or the protection of the trade, the infraction constitutes a criminal offence, whatever might have been the intent of the offender.

The doctrine is well explained in Hardcastle on the Construction and Effect of Statute Law, 3rd ed., p. 459.

In certain offences the Code says "voluntarily and maliciously," while in some others it does not. In the former the criminal intent, *mens rea*, is needed, not in the other.

There are enactments, said Brett, J., in *R. v. Prince* (1875), L.R. 2 C. C.R. 154, which by their form seem to constitute the prohibited acts into crimes, and by virtue of these enactments persons charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are enactments relating to the sale of intoxicating liquors, food, drugs, weights and measures, etc. And the reason why it is not necessary to prove the existence of a *mens rea* in persons charged with committing offences against these enactments is because they do not really constitute the prohibited acts into crimes, but only prohibit them for the purpose of protecting individual interests of individual persons.

That is exactly the case here. In fact, sec. 490 of our Crim. Code reads: "Everyone is guilty of an indictable offence, who, etc."

In the section, the words, "voluntarily and maliciously," have been omitted, although the offence is indictable; it is

complete by the committal of the prohibited act. even without the guilty mind.

The defendant is fined \$15.00 and the costs, and in default of payment, three months' imprisonment.

Defendant convicted.

[COURT OF SESSIONS OF THE PEACE, MONTREAL.]

BEFORE THE HON. C. LANGEЛИER, J.S.P.

THE KING v. HOWLEY.

1. PERJURY (§ II C—60)—EXAMINATION ON DISCOVERY.

A person who makes a statement on oath knowing it to be false, upon examination on discovery under article 286 of the Code of Civil Procedure (Quebec) is guilty of perjury.

2. PERJURY (§ II C—60)—DISPOSITION IN ABSENCE OF OFFICIAL.

The fact that the witness, although sworn by the prothonotary was actually examined in the robing-room and not in the presence of the prothonotary or a judge is immaterial when neither party raised any objection to the mode of examination at the time.

DECIDED: September 26, 1911.

LANGEЛИER, J.:—The prisoner is accused of having perjured himself in two cases in which he was examined as a witness on discovery.

The defence contends that even if the accused swore falsely he could not, under the circumstances, be found guilty, because the two incriminating depositions were illegally taken and also because they did not form part of the record and in consequence they could not have deceived the Court.

It was proved that the accused, who was summoned to appear before a Judge or the prothonotary under article 286, Code of Procedure, had appeared, and after having been sworn by the prothonotary had given his deposition in the advocates' robing-room and not in the presence of the prothonotary.

The defence has contended that a deposition taken under such conditions is absolutely null and could not give rise to an accu-

sation of perjury. In support of this contention it has cited the case of *The King v. Rulofson*, 14 Can. Cr. Cas. 253.

This case cannot apply in the present instance because the proceedings had been taken under a special statute, which required the presence of the officer of justice. In British Columbia there are no provisions similar to those introduced by our Code of Procedure under article 355, which allows the examination of a witness out of Court by the consent of the parties, and this article applies to examination on discovery as well as to examination for the trial. Under the English system of procedure the deposition on discovery does not form part of the record and consequently cannot be submitted to the Judge or Court and cannot deceive them. This was also our system prior to the legislation introduced by 62 Vict. ch. 52, sec. 3, which reads as follows: "The deposition taken before the trial shall in any case form part of the record, etc. (Article 288, C.P.)

It results from this that if a witness perjures himself in this deposition he is presumed to have wished to deceive the Court, which is obliged to take cognizance of it before rendering judgment on the merits. In the case of *The King v. Thickens*, 11 Can. Cr. Cas. 274, the Court of Criminal Assizes at Vancouver held that perjury could be committed in the examination of a witness on discovery. A case of *The King v. Martin*, 21 L.C.J. 156, and which dates from the 10th of May, 1877, has also been cited to me by the defence. This case can have no application subsequent to our new Criminal Code.

Under the old criminal law of our country so many technical objections could be raised that it was almost impossible to obtain a conviction of those who were guilty of perjury. The English common law, which was then in force with us, required that the false testimony should be on a point which was material to the issue and that the Court before which the testimony was given should be regularly constituted. These technicalities had the effect of rendering the punishment of perjury almost illusory. They awoke to this danger in England, and in 1880 a commission, of which Sir James Stephens was president, was

appointed with instructions to investigate the English criminal law and make a report.

As far as perjury is concerned this commission recommended that the word "material" should be struck out, as not being essential to obtain conviction: with regard to the constitution of the Courts and the qualification of Judges, it recommended, in a word, certain radical changes, which had the practical effect of doing away with all the objections which rendered the punishment of perjury so difficult. The commissioners said:—

The offence and the danger of perjury consist in the attempt to deceive a *de facto* tribunal, which is exercising judicial functions, by false testimony. It seems to us desirable that one who has rendered himself guilty of this offence should not escape punishment by reason of certain defects in the constitution of the Court which he has sought to deceive, or in the proceedings.

And it recommended among other things, that all proceedings be declared judicial and susceptible of involving perjury when it is committed—

5. Before any person acting as a Court, justice or tribunal, having power to hold such judicial proceedings, whether duly constituted or not, and whether the proceeding was duly instituted or not before such a Court or person, so as to authorize it or him to hold the proceeding, and although such proceeding was held in the wrong or was otherwise invalid.

Our Criminal Code was revised in 1892 and article 171 is the reproduction of paragraph 5, which I have just quoted. It follows that the intention of our Parliament in adopting this article was to declare that any false assertion made under oath before justice, constituted perjury and was to be considered as an attempt to mislead justice.

This interpretation of our article has been sanctioned by a decision of our Court of Appeals in the case of *Drew v. The King*, 6 Can. Cr. Cas. 241, and confirmed by the Supreme Court, *Drew v. The King* (No. 2), 6 Can. Cr. Cas. 424.

No objection was raised by the parties because the deposition was taken out of the presence of the prothonotary. This is a case in which to apply the rule laid down by Judge Blackburn in 1874 in a case of *The Queen v. Castro*, L.R. 9 Q.B. 350, 356:—

We should be most reluctant to give any countenance to the notion that on a trial before one of the Judges of the Superior Court, who has a general jurisdiction over the subject, a witness might commit perjury with impunity on account of any defect or irregularity in the proceedings, especially when, as in this case, the irregularity, if it were one, was waived by the parties, who, though they cannot by consent give jurisdiction, can waive an irregularity.

The same opinion is expressed in the *Cyclopedia of Law and Procedure*, vol. 30, vo. "Perjury," page 1412:—

Where there are defects and irregularities in the proceeding which are not jurisdictional, as where they render it voidable only and not absolutely void, and such proceeding is amendable or where the defect has been waived by the parties, perjury may be committed therein.

In the same volume, page 1407, we read:—

Where a statement made upon oath by a person on his examination for discovery before trial forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of a statute punishing perjury.

But the strongest authority is article 171 of our *Criminal Code*, which in speaking of judicial proceeding says:—

. . . or before any person acting as a Court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and although such proceeding was held in the wrong place or was otherwise invalid.

In short, the law wishes that it should be perjury to swear falsely by affirming a fact which is known to be false with the intention of misleading justice.

The deposition given by accused on discovery possessed the necessary characteristics to give rise to perjury.

Prisoner convicted.

C. A. Campbell, K.C., for the Crown. N. K. Laflamme, K.C.,
counsel.

J. C. H. Dussault and C. A. Wilson, K.C., for the defence.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE MACDONALD, C.J.A., IRVING AND GALLIHER, J.J.A.

THE KING v. MAH HUNG.

1. APPEAL (§ VII J 7—435)—INSTRUCTIONS TO A JURY—DEFINING CHARACTER OF OFFENCE—CRIMINAL CODE (1906), SEC. 216f.

On a criminal trial an instruction is not erroneous by which the jury were told, in substance, that the accused would be guilty of the offence of procuring under Cr. Code (1906), sec. 216 (f), only if they found that, at the time the accused induced a woman to enter a brothel she was not already an inmate of such a place.

2. JURY (§ II B—59)—CRIMINAL CASES—JUROR HAVING PREJUDICED OPINION—DECLARATION OF SAME AFTER HAVING BEEN SWORN.

A juror in a criminal case who, after he has been sworn, without objection or challenge, states that he is prejudiced against the accused will not be discharged, as objection to his qualification comes too late.

[*Reg. v. Stewart* (1845), 1 Cox. C.C. 174; *Rea v. Edmonds* (1821), 4 B. & Ald. 471; *Rea v. Sutton* (1828), 8 B. & C. 417; *Reg. v. Wardle* (1842), Car. & M. 647, followed.]

DECIDED: January 10, 1912.

CRIMINAL appeal by way of case stated, from a conviction by Murphy, J., at the October (1911) assizes at Vancouver.

The appeal was dismissed and the conviction upheld, the Chief Justice dissenting, being in favour of ordering a new trial.

In the case stated for the opinion of the Court, the learned Judge said:—

The accused was tried before me and a jury at the October assize on an indictment reading as follows:

“(1) That Mah Hung . . . unlawfully did procure one Katie Stephens, a woman, to leave her usual place of abode . . . such place not being a brothel, with intent that she should for the purpose of prostitution become an inmate of a brothel

“(2) That the said Mah Hung afterwards . . . unlawfully did procure the said Katie Stephens, a woman, to become a prostitute

“(3) That the said Mah Hung . . . unlawfully did administer to the said Katie Stephens cocaine and other drugs with intent thereby to stupefy her so as thereby to enable a man to have unlawful carnal connection with her, the said Katie Stephens”

After the case for the Crown was concluded, and while witnesses were being examined for the defence to establish the fact that Katie

Stephens, named in the indictment, was a prostitute, well known to the police as such since 1907, and that she had prostituted herself to Chinamen and white men in different rooms and places of questionable repute in the City of Vancouver, resorted to by her and such Chinamen and white men for the purposes of prostitution, being fully satisfied that the evidence before the Court which is attached and made part of this case stated established at the times mentioned in the indictment the said Katie Stephens was a prostitute I withdrew the second count in the indictment from the jury with the consent of counsel for the Crown. The accused was found guilty by the jury on the first count in the indictment and acquitted on the third count, and sentenced to three years' imprisonment with hard labour.

In my charge to the jury dealing with the first count, I stated:

"The Code says any woman or girl to leave her usual place of abode in Canada—it makes no difference if that woman is a prostitute or not as far as that element of it is concerned—no man has a right to procure her to leave her place of abode for the purpose that is afterwards set out.

"The next stage of the case is such place not being a brothel. That is a very important feature of this crime which you are investigating. A brothel is defined by the Code as follows: A brothel or common bawdy house is a house, room, set of rooms, or place of any kind, kept for the purpose of prostitution, or occupied or resorted to by one or more persons for such purposes. Now you have to find this girl—that is, if you find the first element has been proven, that is, that he procured the girl to leave Vancouver—you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner. In that connection you will have to remember what the definition of a bawdy house or brothel is. It is possible for a woman to be a prostitute and not be an inmate of a bawdy house. I have told you it is no justification for a man to procure a woman to go away because she is a prostitute. If she is merely a street walker, and not an inmate of a house of ill-fame, and if she did not keep a room to which she took men for purposes of prostitution, then the room is not a brothel and she is not an inmate thereof under the Code. On the other hand, if she, as a street walker, did go out and solicit men, and having got men on the street, took them to her room, and kept that room for the purpose of prostitution, then she is an inmate of a brothel. You have to find on the evidence adduced here if this girl was an inmate of a brothel; that is, if she used the room she lived in for carrying on the business of prostitution and that was her business and only business. She might be a street walker and prostitute and yet not be the inmate of a brothel. If she merely went out on the street and solicited men and took them to a brothel or a house of assignation for a short time, she would not be an inmate of a brothel; her room is where she lives, but if she makes that room

the headquarters of a house of prostitution, then she is an inmate of a brothel. You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel, and that is, you must decide whether she was rooming in a house of prostitution or ill-fame; that is, whether she kept a room in some part of this city primarily for the purpose of bringing men there to have intercourse with her. I charge you that it is quite possible for a girl, say, being employed in a restaurant and having a bedroom in the city, to occasionally take a man to her room to have intercourse with her, but that would not constitute that room a brothel or her an inmate of a brothel, because the Code says such rooms must be kept for the purpose of prostitution; that is, it must be the main object of the person occupying that room—the purpose of having sexual intercourse with men that she took there—and unless it was being used for that purpose primarily and not as a living room, but for the purpose of prostitution, it is not a brothel; if you find this girl, although a prostitute, was not in a bawdy house in the sense that I have explained—was not using her room as the headquarters of prostitution, taking men there, or carrying on the business of prostitution in her room, then the second element of this crime is made out. In dealing with that element you must remember that if you have any reasonable doubt, then you must give the prisoner the benefit of that doubt; but you must have a reasonable doubt only on the evidence that was adduced before you here, and on that evidence you must affirmatively make up your minds she was not in a brothel at the time he took her away, remembering what I told you as to what a brothel is.”

Whilst the jury were being empanelled, Mr Russell, for the defence, challenged several for cause, on the ground that they had served on a previous jury which tried and convicted another Chinaman, Dr. Lew, for theft. In such first trial some evidence was given shewing that Dr. Lew and Mah Hung had together taken two white girls—one McDonald and the Stephens mentioned in this case—to Prince Rupert. The challenges were disposed of by triers.

After some of such challenges had been disposed of, two men, who had served on such former jury, were called as proposed jurors. Having been in Court whilst the triers were disposing of persons in the same position as themselves, and, presumably, having observed that statements made by such persons that they were prejudiced against the accused usually resulted in the triers disqualifying such persons, these two men, without waiting for triers, volunteered the statement that they were prejudiced. There were, when this happened, several jurors empanelled, and one of these, who had not served on the former trial and had been sworn without objection, on hearing the two men make the statement that they were prejudiced, arose in the jury box and stated that he, too, was prejudiced. I thereupon stated in open Court that to disqualify a man from service as a juror his prejudice

must be such as would lead him to disregard his oath, which was that he bring in a verdict according to the evidence; that a juror's prejudice must go to this extent, and that such a statement of prejudice by a juror must mean this and not be a mere subterfuge to escape jury duty. The juror in the box made no further statement and counsel for the accused raised no objection.

The swearing of the jury was completed just before the Court rose for the evening adjournment.

On re-assembling next morning immediately after the Court opened, the following remarks passed between the foreman of the jury and myself:

"Foreman of the jury:—Your Lordship, since the adjournment last evening it has come to my attention that one of the jurymen stated that he was prejudiced in this case. Should it be necessary for the jury to bring in a certain verdict, would that enable the accused's counsel to appeal?"

"The Court:—I do not think you need worry about that. You are empanelled as a jury and I have no doubt that the gentlemen of the jury will respect their oaths."

The trial then proceeded in the usual way without further reference by anyone to this particular matter.

The points reserved for the opinion of the Court are:

"(1) Was the extract from my charge above set out a correct statement of the law?"

"(2) With reference to the juror's statement of prejudice, was I right in allowing the trial to proceed under the circumstances above outlined?"

The conviction was upheld, MACDONALD, C.J.A., dissenting.

J. A. Russell, for accused.

W. A. Macdonald, K.C., for the Crown.

MACDONALD, C.J.A. (dissenting):—The conviction should be quashed and a new trial ordered.

I think the learned Judge's charge was calculated to convey to the minds of laymen a wrong impression of the law upon a very material point in the case. The offence charged was that the accused unlawfully procured a woman to leave her usual place of abode, such place not being a brothel, with intent, etc. The onus was upon the prosecution to prove that she had a usual place of abode and that such usual place of abode was not a brothel. The learned Judge charged:—

If you find the first element has been proven, that is, that he procured the girl to leave Vancouver, you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here, in order to justify the prisoner.

I think that is an erroneous statement of the law; it was calculated to lead the jury to understand that unless the prisoner was able to prove that the woman was taken from a brothel in Vancouver he could not justify himself. Those words were also calculated to lead the jury to believe that the offence was made out if the prisoner procured the girl to leave Vancouver; whereas it was necessary for the Crown to prove, not that she was procured to leave Vancouver, but that she was procured to leave her usual place of abode in Vancouver. Now, there may have been no sufficient evidence that this woman had any usual place of abode in Vancouver. From the evidence which is before us, consisting partly of her own, it would be very difficult to say that she had a usual place of abode. The evidence is that she was a common street walker, that she would stay a night in one place and another night in another. Before going to Prince Rupert she went with the prisoner to Agassiz, where she stayed a night in a Chinaman's hut; on return to Vancouver she stayed the next night in a room provided by the prisoner, and apparently the following night in the house of Dr. Lew, and then departed with the prisoner for Prince Rupert. I refer to this evidence only for the purpose of shewing how necessary it was to give a correct and precise charge to the jury and to point out clearly the elements which constitute the crime charged, and what the Crown was obliged to prove. The Crown was required to prove that she had a usual place of abode, and the character of that place of abode. If she had no usual place of abode in Vancouver, then the procuring of her to leave Vancouver would not be an offence; or, if she had a usual place of abode and it was not proven that that usual place of abode was not a brothel, then no offence was committed in procuring her to leave. Taking the charge as a whole, I am convinced that the jury could not have had a clear notion of the law governing the case. In

fact, the whole charge was calculated to mislead them with regard to the elements of the offence which they were required to consider and pass upon. All through the charge the jury were being impressed with what constituted a brothel, and with the fact that they were to find whether she had been taken from a brothel. In another place the learned Judge says: "You have to find on the evidence adduced here if this girl was an inmate of a brothel." Now, clearly, it was not necessary to find this, at all. The fact that the learned Judge afterwards said: "You must affirmatively make up your minds she was not in a brothel at the time he took her away" was not sufficient, in my opinion, to remove the impression which the jury were almost bound to receive from the earlier parts of the charge. But even this is inaccurate and calculated to mislead. Neither there nor elsewhere does he lay stress on "usual place of abode." As, in my opinion, substantial wrong was done, and in all probability a miscarriage of justice brought about, I think the conviction ought not to be allowed to stand.

On the other question, the refusal of the learned Judge to discharge a juryman after he had been sworn, I think the course pursued, in the circumstances of this case, was right.

I would quash the conviction and order a new trial.

IRVING, J.A.:—I have not been able to come to the same conclusion as that reached by the learned Chief Justice, for this reason: The Judge was dealing here with a definition of the crime with which the man was charged; nothing else. A definition as to the onus of proof of the different facts that went to the making up of proof of that charge would be quite a different matter and could be dealt with separately. The only point submitted to us apparently is, was the definition of the crime he gave correct? The statute provides that a prostitute, although she may be known to be a prostitute, if she is not living in a brothel, shall have the protection of the statute; and that is what the Judge was endeavouring to point out to the jury. He, as Judges often do when they are pointing out something to the jury, went

over the case several times, using different language in every instance. In his charge he dealt with the matter four times. In the first place he said: "You have to go further and find that she was in a brothel when he procured her to leave, in order to justify the prisoner." That, it is suggested, is too strong. I do not think it is. But, assuming that it is, he later on says this: "You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel; if you find this girl, although a prostitute, was not in a bawdy house, in the sense that I have explained"—which I understand to mean that she was living there and receiving gain. And again: "You must make up your minds that she was not in a brothel." I think that he fairly pointed out to the jury the object of the statute, in the conclusion he came to, viz., that she was to be protected if she was not an inmate of a brothel at the time. Charges to the jury must be read reasonably. You cannot pick up two or three lines and say: "Well, now, that remark has put the thing before the jury in a wrong sense." You must consider the whole effect of what was said to the jury, and you have to take the whole thing as it would appear to them, and as it appears to counsel at the trial. This you can judge of according to the objections—if any—advanced by him at the time. On that part of the case I am satisfied that the Judge did what was right.

Then, with reference to the other point, it appears that a juryman volunteered the statement that he was prejudiced, after he had been sworn; but the Judge did not think proper to discharge him. In my opinion the Judge was perfectly right. A juryman has no business to volunteer a statement of that kind. Jurymen, after they are sworn, are expected to live up to the oath they have taken. A juror is not at liberty to be asked questions in order to found a challenge before he is sworn. And after he is sworn he speaks through his foreman.

In the case of *Reg. v. Stewart* (1845), 1 Cox, C.C. 174 at p. 175, we find the following:—

At the commencement of the case, and as each juryman came into the box, C. Jones, Serjt., for the prisoners, asked him whether he was

a member of a certain association for the prosecution of parties committing frauds upon tradesmen. Clarkson and Bremridge, for the prosecution, objected to this proceeding.

Baron Alderson:—It is quite a new course to catechise a jury in this way.

Serjt. Jones:—I have a right, my Lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your Lordship will perhaps intimate to the jury that such of them as are members of this association had better retire from the box.

Baron Alderson:—I cannot allow you to cross-examine the jury, nor will I intimate to them anything on the subject you mention. If you like to challenge absolutely you may do so."

There are other authorities on that point. One is to be found in *The King v. Edmonds* (1821), 4 B. & Ald. 471.

Another reason the Judge could not deal with the case was because it was too late. A prisoner could not be in any better position than if he had endeavoured to challenge the man. The challenge must be made in proper time. The authority for that is *Rex v. Sutton* (1828), 8 B. & C. 417, where it was found, after the trial had been proceeded with, that there was an alien on the jury, and Lord Tenterden, C.J., at p. 419, says:—

I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge.

He had a challenge here and he did not take advantage of it.

Another authority on the same point is *Reg. v. Wardle* (1842), Car. & M. 647 at p. 648, where the prisoner having been arraigned and the jury sworn without any challenge, the foreman of the jury stated that the prisoner had a relation on the jury.

Corbett, for the prosecution:—I submit this jury may be discharged without giving any verdict, and a new jury be called and sworn.

Erskine, J. (having conferred with Tindal, C.J.):—I have conferred with the Lord Chief Justice, and we are of opinion that I have no power to discharge the jury [that means, I imagine, on the ground of challenge], and that the case must proceed.

For these reasons I think the Judge was right in refusing to discharge the jury on that occasion.

GALLIHER, J.A.:—It appears to me that our consideration of the case stated is confined to two points, and two only. First, as to whether what the learned trial Judge has said is a correct exposition of the law; and second, with regard to the jurymen.

Now, in the view I take of the Judge's statement here, he was dealing with the section of the Act as to what the legal interpretation of that Act was, and what elements were necessary to constitute a crime or to relieve the prisoner, as the case may be. If I thought that there was any reference to onus at all, or if this stated case was on his charge generally, or if he did not charge the jury as to whom the onus rested upon in regard to whether it was or was not a brothel from which she was taken, I would feel considerable doubt in the way he has put it here. But as I regard it he is dealing simply with the legal phase of the section of the Criminal Code. And I do not think as the case is before us we can go beyond that.

Being confined to that, I am of the same opinion as my brother IRVING. It is not necessary for me to practically repeat, at all events any considerable portion of what my brother IRVING has said with regard to the other point reserved. I agree with him that the Judge was right in not asking the juror to be withdrawn. On the whole I am of the opinion that the conviction should stand.

Conviction upheld, MACDONALD, C.J.A., dissenting.

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J., SCOTT, STUART, SIMMONS, AND WALSH, J.J.

THE KING v. CRAWFORD.

1. CRIMINAL LAW (§ II D—58)—SUMMARY TRIAL—POWER OF MAGISTRATE AS TO AMENDMENT—CRIM. CODE 1906, PART XVI.

The probable effect of Part XVI. of the Criminal Code, R.S.C. ch. 146, dealing with summary trials of indictable offences, is to give to the magistrate trying such an offence without indictment the same powers of amendment as are given to the Courts upon the trial of the same offence under an indictment.

2. CRIMINAL LAW (§ II B—49)—JURISDICTION OF SUMMARY TRIAL—ABSENCE OF SWORN INFORMATION.

The absolute jurisdiction conferred upon a police magistrate to try certain indictable offences upon summary trial without the consent of the accused is exercisable where the accused is present, whether or not an information had been sworn in respect of the offence which is the subject of the trial, if the "charge" is reduced to writing and is read to the accused and a full opportunity is given for making defence thereto.

3. INDICTMENT, INFORMATION, AND COMPLAINT (§ II F—55)—AMENDMENT OF INFORMATION—CHANGING STREET NUMBER OF ALLEGED DISORDERLY HOUSE.

Upon the summary trial of a charge of keeping a disorderly house, the magistrate has power to amend the information during the course of the trial, by changing the street number of the alleged disorderly house, without having the information re-sworn.

[*Reg. v. D'Eyncourt*, 21 Q.B.D. 109, referred to.]

4. INDICTMENT, INFORMATION, AND COMPLAINT (§ II F—55) AMENDMENT—APPLICATION OF CRIM. CODE 1906, SEC. 1124, TO INDICTABLE OFFENCES.

The powers of amendment granted by sec. 1124 of the Canadian Criminal Code, R.S.C. ch. 146, are not confined to summary convictions, but may be exercised in the case of convictions for indictable offences.

[*R. v. Randolph*, 4 Can. Crim. Cas. 165; and *R. v. Spooner*, 4 Can. Crim. Cas. 209, discussed; *R. v. Shing*, 17 Can. Crim. Cas. 463, disapproved from.]

5. DISORDERLY HOUSES (§ I—10)—EXCESSIVE PENALTY—REDUCING ON CERTIORARI.

A conviction upon summary trial before a police magistrate for keeping a disorderly house may be amended in *certiorari* proceedings, if the Court is satisfied as to the proof, by reducing the illegal fine of \$100 and costs to the limit provided by Cr. Code sec. 781 of \$100 including costs; the amount of the costs in such case remaining in the amended conviction but the \$100 penalty being reduced by the amount of the costs so that the total shall not exceed \$100.

[*R. v. Shing*, 17 Can. Cr. Cas. 463, disapproved.]

6. CERTIORARI (§ II—20)—CONVICTION—POWERS OF AMENDMENT—CR. CODE 1906, SEC. 1124.

The word "Justice" is to be construed in sec. 1124 of the Criminal Code 1906 in a different manner from the words "justice of the peace" which were used in the corresponding section of the former Code (Cr. Code 1892, sec. 889) by reason of the statutory definition given to the word "justice" by the interpretation clause, Cr. Code 1906, sec. 4 (18) whereby police magistrates and stipendiary magistrates are included in its meaning, and also by reason of the transposition of former sec. 889 in the 1906 consolidation from the summary convictions part to the part of the 1906 Code entitled "Extraordinary Remedies," with the result that the present section 1124 as to amendment on *certiorari* applies not only to "summary convictions" but to convictions on "summary trials" held under Part XVI. of the Code.

DECIDED: October 4, 1912.

THE accused was charged with keeping a disorderly house under section 228 of the Criminal Code and was tried summarily before I. S. Cowan, Police Magistrate of the city of Edmonton, convicted and fined one hundred dollars and costs, \$6.50.

This is a motion for a *certiorari* to quash the conviction on the ground that the magistrate at the close of the hearing amended the information by striking out "428 Kinistino Ave." and substituting "436 and 438 Kinistino Ave." without such amendment being re-sworn and that the penalty is in excess of what the magistrate had jurisdiction to impose.

The conviction was varied and the fine reduced to \$93.50 with costs \$6.50, making \$100, the authorized maximum fine.

L. F. Clarry, Dep. Attorney-General, for the Crown.

H. A. Mackie, for the defendant.

HARVEY, C.J.:—Considering the question of the amendment of the information first, it appears that with the record there is a sworn information in the form 3 of the Code in which the charge is that the accused "did unlawfully keep a disorderly house; to wit, a common bawdy house at 428 Kinistino Avenue, in the city of Edmonton." "428" is struck out and in its place is inserted "the Maple Leaf Rooming House, Nos. 436 and 438" with a note by the Magistrate giving the date and stating that the amendment is made by him. The record also shews that this amendment was made at the request of counsel

for the prosecution after the evidence for the prosecution and for the defence had been given, but before the evidence in rebuttal and in the face of the opposition of counsel for the accused, who after it was made objected to it "without the information being re-sworn."

No further or other objection or application appears to have been made regarding it, and the evidence in rebuttal confirmed the correctness of the particulars of the amendment. This, however, had been clearly established by the evidence of the accused herself and there appeared to be no doubt in any of the testimony as to the particular premises, the only question of doubt being as to the street number. No authority is mentioned or reason urged why the Magistrate could not make the change he did, nor does any reason suggest itself to me.

The amendment is a very trivial one and under the circumstances one which could not prejudice the accused in the least. No objection could have been taken to the charge in the information if the street number had not been given, and it is quite clear by section 724, that if it had been a case of summary conviction, no amendment would have been necessary. It is also quite clear that on a trial or indictment, or, in this province on a charge authorized by section 873A, such an amendment as the present one could be made. The trial in the present case was of an indictable offence though not on an indictment but in a more summary and much less formal manner. Part XVI. which relates to summary trials of indictable offences has no remedial provisions corresponding to those of the summary conviction part or of the part relating to trials on indictments. Indeed by section 798 the provisions of Part XV. as well as the provisions relating to preliminary enquiries are expressly excluded, but it is provided by section 791 that a conviction shall have the effect of a conviction upon indictment. It seems not unreasonable, therefore, to conclude that it was intended that the remedial powers given to the Courts on the trial of the offences under indictment should belong to the Magistrates trying the same offences but without indictment.

Apart from that, however, it seems obvious that an information was not required in the present case.

From sections 654 and 655 it appears that the purpose of an information is to authorize the issue of a summons or a warrant to procure the presence of the person accused, but when the person charged is before the Court without summons or warrant, as the accused was in the present case, there is no occasion whatever for an information sworn or otherwise. Where an information has been laid and the attendance of the person accused obtained in pursuance thereof, it naturally would contain the material of the charge but Part XVI. makes no reference whatever to an information but confines itself to the word charge, and in section 778 under the title "Procedure" provides that (after the prisoner has consented to be tried summarily if such course is required) "the magistrate shall reduce the charge to writing and read the same" to the accused, indicating that up to that time there may be nothing in writing and that at no time is anything relating to the charge required to be sworn. No particular formality is required but natural justice requires that any person being tried should know what he is being tried for and should have the fullest opportunity for meeting the charge. It is not and cannot be suggested that the accused in the present case had any doubt of the charge in which she was convicted or required any further opportunity for her defence.

In *The Queen v. D'Eyncourt*, 21 Q.B.D. 109, Field, J., at p. 117, says:—

There is no doubt that at the hearing a charge may be preferred which has not been included in any warrant or in any charge made at the police station.

And Wills, J., at p. 124, referring to the case of a charge suggested by the evidence being there for the first time made and thereupon investigated, says:—

Such a course is constantly taken and it is legitimate where no objection is made or where a proper opportunity is afforded of meeting any new evidence.

The facts in that case also indicate that in Police Court proceedings the charge is commonly contained in a charge sheet, made out, no doubt, by the clerk of the Court, containing presumably the names of the different persons to be tried with the nature of the charge on which each is to be tried.

The information, therefore, on the trial before the Magistrate ceases to have any signification as such and in the present case is to be treated simply as containing the particulars of the charge in writing. The amendment, therefore, as made was perfectly proper.

With reference to the jurisdiction, it appears that under section 773, par. (f), Crim. Code 1906, this is a charge which may be properly tried summarily, but it is provided by section 781 that in any case summarily tried under that paragraph as well as some of the others the fine which may be imposed is one, "not exceeding, with the costs in the case, one hundred dollars."

Section 777, Crim. Code 1906, confers a jurisdiction on a certain limited class of persons occupying judicial positions in certain limited areas to try summarily all cases which may be tried at a Court of general sessions of the peace, and to impose the penalty which could be imposed by such Court, and it is contended on behalf of the Crown that inasmuch as it is admitted that I. S. Cowan is a Police Magistrate of a city of over 2,500, the population specified in sub-section 2 of section 777, the conviction may be treated as being made under section 777 in which case the penalty would not be beyond the Magistrate's jurisdiction.

In *Reg. v. Archibald* (1898), 4 Can. Crim. Cas. 159, a Divisional Court in Ontario consisting of McMahon and Rose, JJ., supported a penalty which would have been excessive under the jurisdiction conferred by the section corresponding to present section 773, because it came within the jurisdiction given by the section corresponding to section 777, and in other cases other Ontario Judges have concurred in this view. On the other hand the Court of Appeal of Manitoba in *Rex v. Shing* (1910),

17 Can. Crim. Cas. 463, refused to support a penalty under section 777 in excess of the jurisdiction under 773. In the present case it is not necessary to determine which view is correct for the jurisdiction of 777 is only conferred by the consent of the accused and there is nothing to indicate nor is it suggested that such consent was given in the present case.

A difficulty presents itself as to what consent the accused may give since sec. 774, as amended in 1909, and sec. 776 provide that no consent shall be necessary and shall not be asked for. It would seem that the only consent which would be necessary would be a consent not to be tried, but to be sentenced to an increased penalty. However that may be, it is clear that, some consent is necessary to bring the case within section 777, and such consent was present in the Ontario cases, but is not stated to have been in the Manitoba case, and was not here. Therefore, for that reason it is clear that the penalty is in excess of the Magistrate's jurisdiction in the present case.

The Court, however, is asked to amend under the authority of section 1124, Crim. Code 1906. It is urged, however, that section 1124 is limited to summary convictions and does not extend to convictions for an indictable offence, such as this was.

Originally the section appeared in connection with the summary conviction provisions and in *Rex v. Randolph* (1900), 4 Can. Crim. Cas. 165, Ferguson, J., held that the provisions respecting amendment in cases of summary convictions did not apply to that case which was a case of summary trial, and in *Rex v. Spooner* (1900), 4 Can. Crim. Cas. 209, in which the conviction was amended, in the judgment of the Divisional Court delivered by Street, J., it is stated that the powers of amending convictions under the summary convictions clauses are greater than under the summary trials clauses. Upon the revision of the statutes in 1906, this section was removed from the summary convictions part and placed in a part near the end of the Code entitled "Extraordinary Remedies" in addition to which the expression "Justice of the Peace" was altered to the word "Justice" so that it refers now not to convictions and

orders made by a Justice of the Peace but to convictions and orders made by a Justice. Justice of the Peace being itself a sufficiently definite term was not, and is not, interpreted, but the indefinite term "Justice" is defined in the interpretation clause of the Code as including a Police or Stipendiary Magistrate or anyone having the authority of two Magistrates.

The expression "conviction by a Justice" therefore includes any conviction which may be made not merely on summary convictions but on summary trials.

In *Rex v. Shing*, 17 Can. Crim. Cas. 463, the Manitoba Court held that the change in the section was immaterial and that the power of amendment was still limited to summary convictions. With all respect I cannot agree with that view. It appears to me that in that case the alteration of "Justice of the Peace" to "Justice" must have been entirely overlooked, for the judgment states on p. 468, after referring to *Rex v. Randolph*, 4 Can. Crim. Cas. 165, and *Rex v. Spooner*, 4 Can. Crim. Cas. 209, as follows:—

A judicial interpretation having thus been placed upon section 889, Parliament re-enacted it in R.S.C. 1906, ch. 146, without material change, presumably recognizing and adopting such interpretation. See sec. 7 of the Act respecting the Revised Statutes of Canada, 1906. It would not be safe to draw the conclusion that because Parliament placed in the revision the sections under a different title, it was its intention that the section should receive an interpretation other than that previously adopted by the Courts.

In my opinion the change in the section which I have mentioned was material and coupled with the transposition of the section indicated an intention to change the law. Section 21, sub-sec. 4 of the Interpretation Act, R.S.C. 1906, ch. 1, is as follows:—

Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision, or otherwise, been placed upon the language used in such Act, or upon similar language.

Section 7 of the Revised Statutes of Canada, 1906, Act, 6-7 Edw. VII. ch. 43, to which reference is made in the fore-

going extract from the judgment in *Rex v. Shing*, 17 Can. Crim. Cas. 463, is as follows:—

7. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

2. If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then, as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail. but, as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

The second sub-section shews clearly Parliament's contemplation that there would be changes made by the revision and declares that these changes shall become effective when the Revised Statutes take effect and the first sub-section apparently means to indicate that if no changes are made the repeal and re-enactment effected by the Revised Statutes shall not make any break in the continuity of the law which shall remain as far as Parliament is concerned as if there had been no Act of revision.

I am clearly of opinion that section 1124 authorizes the amending of the conviction in the present case by reducing the penalty to one which is authorized by section 781 which should have been observed by the Magistrate if a perusal of the depositions satisfies the Court that the offence charged has been committed.

A perusal of the depositions does so satisfy me, and I therefore think that the fine should be reduced to \$93.50 which with \$6.50 costs, will amount to \$100, the authorized maximum fine.

SCOTT, STUART, SIMMONS, and WALSH, JJ., concurred.

Conviction varied and fine reduced.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

THE KING v. PEMBER.

(Decision No. 1.)

1. MUNICIPAL CORPORATIONS (§ II C 3—111a)—BY-LAW REGULATING “TRANSIENT TRADERS”—TAKING ORDERS.

A person is not a “transient trader” requiring a municipal license as such under the Ontario Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 583,* where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (*ex gr.* an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business.

[*Rez v. St. Pierre* (1902), 4 O.L.R. 76, followed.]

DECIDED: April 3, 1912.

MOTION to quash a magistrate’s conviction of the defendant under a transient traders’ by-law of a municipality.

*Section 583 of the Consolidated Municipal Act, 3 Edw. VII. (Ont.), ch. 19, provides as follows:—

583. By-laws may be passed by the councils of the municipalities or Boards of Commissioners of Police and for the purposes in this section respectively mentioned, that is to say:—By the councils of townships, towns and villages, and of cities having less than 100,000 inhabitants and by the Board of Commissioners of Police in cities having 100,000 inhabitants or more.

30. For licensing, regulating and governing transient traders and other persons who occupy premises in the city, town, village, or township, for temporary periods, and whose names have not been duly entered on the assessment roll of the municipality in respect of income or personal property for the then current year; and who may offer goods or merchandise of any description for sale by auction, or in any other manner conducted by themselves or by a licensed auctioneer or otherwise.

(a) No such by-law shall affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed of within the county in which the insolvent carried on business therewith at the time of the issue of an attachment or of the execution of an assignment.

31. For requiring all transient traders who occupy premises in the municipality, and are not entered upon the assessment roll or who may be entered for the first time upon the assessment roll of such municipality, in respect of income or personal property, and who may offer goods or merchandise of any description for sale by auction, or in any other manner conducted by themselves or by a licensed auctioneer, or by their agent or otherwise, to pay a license fee before commencing to trade.

The conviction was quashed with costs against the informant.

J. Jennings, for the defendant.

A. J. Wilkes, K.C., for the informant.

TORONTO, April 3, 1912.

MIDDLETON, J.:—The firm of Pember & Co. carry on business in Toronto, dealing in hair goods and toilet articles. The accused, Frank R. Pember, is not a member of the firm, but travels for it. His custom, which he followed on this occasion, is to rent a room at an hotel at the place he visits, after previously advertising his advent, and there to display samples of the wares in question to those attracted by his advertisement. He does not sell the articles exhibited; he takes orders, which are transmitted to the firm in Toronto, and are there accepted or rejected by the firm. The question is, is this an infringement of the by-law of the town, which has been passed in the terms of the Municipal Act and its amendments? This narrows

(a) No such by-law shall affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed within the local municipality in which the insolvent carried on business therewith, at the time of the issue of an attachment or of the execution of an assignment.

(b) The words "transient traders" wherever they occur in clauses 30 and 31 of this section, shall extend to and include any person commencing in the municipality the business in the said clauses mentioned, who has not resided continuously in such municipality for a period of at least three months next preceding the time of the commencement by him of such business therein.

By the councils of townships, cities, towns and villages:—

32. For fixing the sums to be paid for licenses required under by-laws passed under the preceding clause 30.

33. For fixing the sums to be paid for licenses under by-laws passed under the preceding clause 31, not exceeding in cities and towns \$250 and in other municipalities \$100 for each license; and for providing that the sum so paid for a license shall be credited to the trader paying the same upon and on account of taxes for the unexpired portion of the then current year, as well as any subsequent taxes, should such trader remain in the municipality a sufficient time for taxes to become due and payable by him, and in any other event to be taken and used by the municipality as a portion of the license fund of such municipality;

Provided, nevertheless, that the license fee imposed by any by-law of any village situate within any territorial district may be a sum not exceeding \$200.

itself to a question whether what is done constitutes the accused a transient trader, within the meaning of the statute.

I think the matter is concluded by the case of *Rex v. St. Pierre*, 4 O.L.R. 76. There it was held not to be an offence for a person temporarily at an hotel to take orders there for clothing to be made in a place outside the municipality, from material corresponding with the samples exhibited. Since that decision, the Legislature has amended the statute with respect to hawkers, by adding to the interpretation clause defining that word, so that it now applies to those "who carry and expose samples or patterns of any such goods to be afterwards delivered, within the county, to any person not being a wholesale or retail dealer in such goods, wares, or merchandise."

Although the section of the statute relating to transient traders has been under consideration by the Legislature and has been amended, no corresponding amendment has been introduced, and I cannot find anything in the amendments which have been made which will make the reasoning in the case cited less applicable.

Mr. Wilkes argued very forcibly that what was done by the accused was within the mischief apparently aimed at by the statute, and was just as unfair to those residing within the municipality and bearing the burdens of local taxation as any kind of trading. Unfortunately this argument must be addressed to the Legislature itself, as I cannot assume that it has not been adequately considered by the learned Judges who decided the *St. Pierre Case*, *Rex v. St. Pierre*, 4 O.L.R. 76, after argument by eminent counsel.

The conviction should, therefore, be quashed, with costs to be paid by the informant. The usual order for protection, so far as the magistrate is concerned, will be granted, and the \$100 paid into Court as security should be refunded.

Conviction quashed.

N.B.—The above decision was affirmed by the Divisional Court, see *R. v. Pember* (No. 2), *post*, p. 60.

[HIGH COURT OF JUSTICE, ONTARIO.]

(The Divisional Court.)

BEFORE FALCONBRIDGE, C.J.K.B., BRITTON, AND RIDDELL. JJ.

THE KING v. PEMBER.

(Decision No. 2.)

1. MUNICIPAL CORPORATIONS (§ II C 3—111a)—BY-LAW REGULATING “TRANSIENT TRADERS”—TAKING ORDERS.

A person is not a “transient trader” requiring a municipal license as such under the Ontario Municipal Act 1903, 3 Edw. VII. ch. 19, sec. 583, where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (*ex gr.* an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business.

[*Rex v. St. Pierre* (1902), 4 O.L.R. 76, followed; *Rex v. Pember* (No. 1), 20 Can. Cr. Cas. 57, 2 D.L.R. 542, affirmed.]

2. MUNICIPAL CORPORATIONS (§ II C 3—111a)—WHO IS A “TRANSIENT TRADER”?—WHAT AMOUNTS TO AN OFFER OF GOODS FOR SALE.

One who, though not a resident in a municipality, merely exhibits samples of, and takes orders for, his goods therein, the goods themselves not being within the municipality, does not “offer goods for sale,” and is not a “transient trader,” within the meaning of the provisions of the Municipal Act, 1903 (Ont.), or of a municipal by-law passed thereunder.

3. MUNICIPAL CORPORATIONS (§ II C 3—111a)—OFFENCE UNDER BY-LAW REGULATING TRANSIENT TRADERS.

In order to constitute an offence against a municipal by-law passed under the authority of the provisions of the Municipal Act relating to “transient traders,” 3 Edw. VII. (Ont.) ch. 19, sec. 583 (30 and 31), the goods offered for sale must be goods in the municipality. (*Per Britton, J.*)

DECIDED: May 4, 1912.

APPEAL by the complainant from the order of Middleton, J., *ante*, p. 57, 2 D.L.R. 542, 3 O.W.N. 957, quashing a conviction made by the Police Magistrate for the city of Brantford, against the defendant, for unlawfully doing business in Brantford, on the 29th January, 1912, without first having obtained a license, contrary to a transient traders by-law of the city.

The appeal was dismissed.

A. J. Wilkes, K.C., for the appellant.

J. Jennings, for the defendant.

TORONTO, May 4, 1912.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

BRITTON, J.:—It is a matter of complaint against the defendant that he advertised his going to Brantford in a way that indicated a clear intention of going with a stock of goods to be sold in Brantford. I do not think so. The advertisement stated that he would be at the Kerby House, in Brantford, on the day named, with the latest Parisian and American styles of ladies' hair goods shewn in the Dominion. He stated that "all hair and scalp troubles will be diagnosed free of charge," and he had "something to say for the comfort of bald men" about the "Pember ventilated light weight toupees worn and recommended by the medical profession." Nothing was said about selling the goods or offering them for sale in Brantford. In the meagre evidence given before the Police Magistrate no sale was proved.

The witness Mrs. Bush apparently had no personal knowledge of what she was called upon to prove. She had a strong suspicion that opposition to her in her business was coming from the outside, and naturally she wanted something done to repel the invader. The defendant's admission, whatever it amounted to, was not made until after the conviction. What he said was—and no objection was made to considering that as evidence—that his going to Brantford was to exhibit samples, take orders for similar goods, and forward these orders, so that, if the orders were accepted, goods would be supplied from the factory outside of Brantford, by the employer of the defendant.

This, as I understand the evidence and business, is what commercial travellers, by the hundreds, are doing all over Ontario. I do not think that kind of business makes the commercial traveller a "transient trader," within the meaning of the Act or within the by-law of the City of Brantford.

In addition to the one argument addressed to us, counsel for the appellant handed in a carefully prepared argument in writing. I have read it with care, and I have consulted the cases cited; but I am unable to agree with the contention of the appellant.

To constitute the offence charged, the goods offered or sold must be goods in Brantford. I agree with the learned Judge appealed from.

The appeal should be dismissed with costs.

RIDDELL, J.:—The appeal should be dismissed, upon the short ground that before the magistrate there was no evidence, i.e., no legal evidence, of any offence. It is said that the magistrate disbelieved the defendant: that may be so—no tribunal is compelled to believe anybody, witness or party: *Rex v. Van Norman* (1909), 19 O.L.R. 447, at p. 449. But no tribunal can find the existence of any alleged fact proved simply because a witness or party who is not believed swears that it does not exist.

But, as it is desired to have a decision on the facts alleged, I would say that Mr. Wilkes, in his able and exhaustive argument, has entirely failed to convince my mind that the case followed by my learned brother, *Rex v. St. Pierre* (1902), 4 O.L.R. 76, is wrongly decided.

Nor am I able to draw any substantial distinction between that case and the present. To my mind, there is no difference in principle in taking orders for an article to be supplied from a distant city, whether what is produced to those from whom it is hoped to secure orders is a picture of the article, or a sample of goods from the counterpart of which the article is to be made, or a sample of the article itself—in none of these cases are goods offered for sale.

The argument, when reduced to its lowest terms, was in reality based upon a supposed principle, dear to those concerned in raising revenue for municipalities, etc., that *prima facie*

every one should be taxed for everything he does or leaves undone and on everything that he has.

But that is not the law yet. And the argument that "transient traders" should be held to include all who do any business in a municipality who do not pay taxes in and to the municipality must be addressed to the Legislature, not to the Court.

The appeal should be dismissed with costs.

Appeal dismissed.

[COURT OF KING'S BENCH, QUEBEC.]

(Appeal Side.)

BEFORE ARCHAMBEAULT, C.J., TRENHOLME, LAVERGNE, CROSS,
CARROLL, AND GERVAIS, JJ.

THE KING v. MONTMINY.

1. EVIDENCE (§ IV G—422)—DEPOSITIONS—PRELIMINARY INQUIRY—LEAVE TO USE AS EVIDENCE.

The depositions taken before justices on a preliminary inquiry are not part of the trial proceedings, though in certain circumstances the Court may give leave to have them read as evidence at the trial.

2. TRIAL (§ I—6)—WHEN TRIAL OF DEFENDANT BEGINS.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

3. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—ABSENCE OF PROPERLY PROVED COPY OF DEPOSITIONS—SAME CHARGE—GROUND FOR QUASHING.

The absence of a properly proved transcript of the depositions is not a ground for quashing the indictment, provided such indictment sets out the same charge as the one contained in the commitment.

[*R. v. Lepine*, 4 Can. Cr. Cas. 145; *R. v. Traynor*, 4 Can. Cr. Cas. 410 and *R. v. Jodrey*, 9 Can. Cr. Cas. 51, specially referred to.]

4. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINDER OF DIFFERENT COUNTS.

The Crown Prosecutor may prefer indictments for as many different offences as he finds disclosed by the depositions, and also for the charge set out in the commitment for trial.

DECIDED: June 17, 1912.

CROWN case reserved by way of appeal from a conviction upon indictment.

P. Bouffard, K.C., for the Crown.

Gust. Hamel, K.C., for defendant.

Quebec City, June 17, 1912. The unanimous opinion of the Court was delivered by

CROSS, J.:—The defendant appeals by way of a stated case. Two questions have been reserved by the learned trial Judge.

The first question to be decided is whether the defendant's motion to quash the indictment, on the ground that the charge was not based upon facts disclosed in the depositions taken at the preliminary inquiry, should have been granted or not.

The defendant was committed for trial and the indictment is for the charge on which he was committed. The evidence at the preliminary inquiry was taken in shorthand by a stenographer. The stenographer was sworn before having acted.

Amongst the papers transmitted to the clerk of the trial Court there was a transcript of the depositions of three witnesses signed by the justice and accompanied by the affidavit of the stenographer called for by sec. 683, and there was also a transcript of what purported to be the depositions of three other witnesses as to which there was no affidavit of the stenographer.

The depositions of the three witnesses which were authenticated by the proper affidavit cannot be said to have disclosed the facts of the charge laid in the indictment. The material facts are to be found in the papers which purport to be the depositions of the other three witnesses, but, as already stated, the stenographer's affidavit as to those was not transmitted to the clerk of the trial Court before the finding of the indictment.

Is it to be said that the indictment ought to have been quashed because the depositions of three of the witnesses had not been authenticated and put of record?

At the hearing of the appeal it appears to have been thought by counsel that the depositions taken before the justice formed a sort of record and should have been available to be read by the grand jury. That, of course, is a mistake. Depositions taken before justices in the preliminary inquiry are not part of the trial proceedings, though in certain circumstances the Court may give leave to have them read as evidence at the trial. The

purpose of the taking of such depositions is to enable the justice to decide whether or not the accused should be put on his trial, and if he "thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment." (Sec. 690.) They do not constitute part of the trial procedure.

The actual procedure of trying the defendant commences with the preferring of the bill of indictment.

The grand jurors are the initiators who "on their oath present" the defendant to be tried. If they do this in disregard of the requirements of the vexatious indictment enactments contained in the Code, their finding or bill should be quashed, but if the accused person does not apply to have the indictment so quashed before commencement of the trial, any right to do so is held to have been lost.

Before the enactment of the vexatious indictment legislation any person could submit a bill to the grand jury, and every person was exposed to be so proceeded against without prior notification of the charge.

That freedom of bringing charges was taken away for a time in respect of charges of any of an enumerated number of offences and afterwards in respect of charges of all indictable offences by what are now sections 870, 871, 872 and 873 of the Code.

The general rule now is that—

The counsel acting on behalf of the Crown at any Court of criminal jurisdiction may prefer against any person who has been committed for trial at such Court a bill of indictment for the charge on which the accused has been so committed, or for any charge founded on the facts or evidence disclosed in the depositions taken before the Justice: Code, sec. 872.

If counsel, acting on behalf of the Crown, in framing the bill of indictment here in question, had gone outside of the commitment by basing it upon other matter disclosed in the depositions, it is clear that, against a motion to quash, it would be for him to establish, by reference to the transcript, that the depositions had been regularly taken and authenticated.

But is he bound, against such a motion, to go behind a commitment and support the regularity of the indictment by the production of transcribed depositions, when the indictment does not go outside of the commitment?

The argument for the appellant is in substance that, if the commitment is not based upon depositions regularly taken, there is no valid commitment and that it is consequently necessary to see if the depositions have been taken in conformity with the requirements of the Code.

Stated in that general way, the argument would seem to be supported by the decisions in the *Lepine* and *Traynor* cases, 4 Can. Cr. Cas. 145 and 410.

It might, however, be seriously answered that, having regard to the object of the vexatious indictment enactments, and to the fact that, in the form in which they were introduced by 32-33 Vict. (Can.) ch. 29, sec. 28, and 40 Vict. (Can.) ch. 26, secs. 1 and 2, no reference was made to depositions taken in the preliminary inquiry, the preferring of the indictment being merely forbidden "unless the person accused has been "committed to or detained in custody," etc., these decisions proceed upon the erroneous view that the taking of the depositions constitutes a step in the trial of the defendant.

There would seem to be ground for the criticism of one of these decisions, made in *R. v. Jodrey*, 9 Can. Cr. Cas., at p. 481, where it was said:—

I am unable to follow Mr. Justice Würtele in *The King v. Traynor*, 4 Can. Cr. Cas. 410, nor do I believe that he correctly states the law if he means that an indictment found by the Grand Jury ought to be quashed because the depositions have been improperly taken.

While the grand jury may take upon themselves to read such depositions, it is not the regular course for them to do so.

A Grand Jury may make a presentment of their own knowledge, and, in considering a preferred indictment, may take into account any outside knowledge they may have: Bowen-Rowlands on Criminal Proceedings on Indictment and Information, 2nd ed. 1910, p. 100, rule 104.

For the decision of the present case, however, it is unnecessary to express an opinion as to whether the cases of *Lepine*

[*R. v. Lepine*, 4 Can. Cr. Cas. 145] and *Traynor* [*R. v. Traynor*, 4 Can. Cr. Cas. 410] were rightly decided or not, and this for reasons which I will now state.

It appears to me that we should not lose sight of the distinction between the "evidence" and the "transcript" of the evidence taken by the justice in a case in which the evidence has been taken in shorthand. In this case the stenographer was sworn at the outset.

The real record of the evidence is what he took down in shorthand as it was uttered by the witnesses. As pointed out in *The King v. Bond*, 19 Can. Cr. Cas. 96: "If the depositions are taken in Chinese characters, they are none the less depositions."

It is to be assumed that the magistrate did his duty. The presumption *omnia rite* applies to the acts of justices other than convictions. Having heard the witnesses, it was for the magistrate to decide whether to commit or not. He did decide to commit, after having had the defendant's consent to dispense with the reading of the testimony.

It follows that, the evidence having been regularly taken, the subsequent acts of extending it in ordinary handwriting and transmitting it to the clerk of the trial Court "as soon as may be after the committal of the accused" (sec. 695) were mere matters of directory procedure, the neglect of which could not necessitate the quashing of the bill of indictment, though, as already stated, if the prosecutor, in framing the indictment, had gone outside of the committal, the trial Court might have considered it right to quash the indictment if an intelligible or legible transcript of the evidence were not forthcoming.

In accordance with this view, I find the following expression of opinion:—

The absence of statutory formalities in the transcript of the evidence taken at the preliminary examination constitutes no objection to an indictment based on the transcript, where it appears that it was the identical transcript of the examination: Cyc. "Criminal Law," vol. 12, p. 320.

In a note, 12 Cyc. 320, a decision is cited to the effect that

“an order of commitment being made after examination, the transcription of the notes of the shorthand reporter is not essential to the jurisdiction to proceed by information”—meaning indictment under our system: *People v. Riley*, 65 Cal. 107, 3 Pac. 413.

In the case before us, the charge set out in the indictment is the same as is set out in the commitment, and the depositions were not resorted to to find or frame the charge. The appellant cannot say that he was not charged before a magistrate. Neither can he say that he was not committed. The vexatious indictment law has not been infringed. The terms of sec. 872 have been complied with.

I, therefore, conclude that the defendant's objection, based upon the absence of a properly proved transcript of the depositions, is not well-founded.

The other ground of appeal is that the defendant was tried and acquitted upon another indictment for an offence, the matter of which was said to have been disclosed by the depositions taken by the magistrate. This other indictment was returned by the grand jury at the same time as the one upon which the defendant was convicted, but the trial of the latter took place after the acquittal on the other.

The argument for the appellant is that, inasmuch as the disjunctive “or” is made use of in sec. 872, the prosecuting counsel could not indict both for the charge set out in the committal and for another charge founded on matter disclosed in the depositions, and that, having gone to trial on one charge, he could not put the appellant in jeopardy on the other.

I consider it clear that the prosecutor was not so restricted but could prefer indictments for as many different offences as he might find disclosed by the depositions, and also an indictment for the charge set out in the committal, and that this ground of appeal is also not well founded.

My conclusion (speaking in the foregoing observations for myself only) is that the verdict should be affirmed.

Conviction affirmed.

[COURT OF KING'S BENCH, QUEBEC.]

(Appeal Side.)

BEFORE AROHAMBEAULT, C.J., TRENHOLME, LAVERGNE, CROSS,
AND CARROLL, JJ.

THE KING v. SEGUIN.

APPEAL (§ VII K—446)—WAIVER OF OBJECTION TO PRELIMINARY ENQUIRY
BY ARRAIGNMENT AND PLEA—CR. CODE (1906), SEC. 898.

An objection that the preliminary enquiry in a criminal case was not conducted according to law will not avail where the accused, who had been committed for trial, pleaded not guilty and stood trial without questioning the regularity of the preliminary proceedings.

DECIDED: March 30, 1912.

A criminal appeal from the district of St. Hyacinthe. At the end of October, 1911, the store of one Bissonnette at St. Hyacinthe was broken into and articles stolen. The prisoner was arrested on suspicion of being party to the theft and was brought up before a magistrate and committed not for theft, but for receiving, "*recel.*" After his committal the prisoner made option for a speedy trial, was found guilty and condemned to three years in the penitentiary. He then made an application for and was granted a reserved case.

Messrs. N. K. Laflamme, K.C., and A. Fontaine, K.C., for the prisoner.

J. C. Walsh, K.C., for the Crown.

The judgment of the Court was delivered by TRENHOLME, J.:—The grounds are two-fold, firstly, it is claimed that the identity of the prisoner was not established, and secondly, that the preliminary *enquête* was not properly conducted according to law.

We say this second objection comes too late. The prisoner never raised this objection before his plea, nor at any time during his trial. He appeared before the magistrate and pleaded not guilty and stood his trial. Once he made his option and appeared before the magistrate, the magistrate had jurisdiction

to hear the case. Therefore, we say that all objections on the score of irregularities in the preliminary enquiry must be overruled.

As to his identity we have no doubts either that it was properly established. The evidence is clear. The conviction is affirmed.

Conviction affirmed.

[COURT OF APPEAL FOR MANITOBA.]

BEFORE HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, AND
HAGGART, J.J.A.

THE KING v. KERR.

1. APPEAL (§ III E—91)—NOTICE OF APPEAL IN CRIMINAL CASE—SERVICE ON COUNSEL—ATTENDANCE OF ACCUSED.

The Court of Appeal hearing an appeal by the Crown by way of reserved case from a ruling in favour of the accused on a criminal trial will hesitate to hear the appeal of which notice has been served on his counsel but not on the accused personally, although counsel for the accused is present to argue the appeal and admits that he had shewn the accused the notice of appeal; but an adjournment for personal service will not be necessary if the accused attends in person at the argument of the appeal.

2. TRIAL (§ III E 5—263)—CORRECTNESS OF INSTRUCTION TO JURY—SHOOTING WITH INTENT TO MURDER.

On the trial of an indictment for shooting with intent to murder, it is proper that the jury be directed that if the evidence so warrants, a verdict may be rendered of shooting with intent to maim or to do grievous bodily harm.

3. NEW TRIAL (§ II—8)—ERRONEOUS RULING—DISCRETION OF COURT AS TO GRANTING NEW TRIAL.

Where on a trial for shooting with intent to murder the jury returned a verdict of acquittal after an erroneous ruling by the trial Judge that the jury could not be directed, on such indictment, to bring in a verdict for the lesser offence of shooting with intent to maim or to do grievous bodily harm, if they found such lesser offence proved, a new trial will not necessarily be granted by the Appellate Court on reversing such erroneous ruling on an appeal by the prosecution, but the Court will exercise its discretion in refusing a new trial if it considers that the evidence does not warrant it.

DECIDED: May 1, 1912.

RESERVED CASE stated by METCALFE, J., as follows:—

Robert Kerr was tried before me with a jury at the spring assizes for the northern judicial district, on a charge of having at the rural

municipality of Minto, in the Province of Manitoba, on the ninth day of November, one thousand nine hundred and eleven, shot at Alexander Miller with intent to murder; on which indictment the jury returned a verdict of not guilty.

On the trial counsel for the Crown asked me to direct the jury that, if the evidence justified it, a verdict of shooting with intent to maim, disfigure or disable, or to do some other grievous bodily harm, might be found on the indictment as laid.

There was evidence which, if believed by the jury, would have justified such a verdict.

I refused to so direct the jury. Was I right?

(Sgd.) THOMAS L. METCALFE, J.

Dated at Winnipeg this 18th day of April, 1912.

R. B. Graham, Deputy Attorney-General, for the Crown, stated that he had served notice of the application upon *G. A. Eakins*, counsel for the accused, but that he had not been able to effect personal service upon the accused himself. The cases shew that the retainer of counsel ends with the verdict of the jury, therefore the accused would have to be served personally.

G. A. Eakins admitted that he had shewn the accused a copy of the notice served upon him.

The Court seemed to be of opinion that that was not sufficient, and as *Mr. Eakins* stated he could have his client present in Court the next morning, the case was allowed to stand.

The case was argued the next day, when the accused was present in Court.

R. B. Graham, Deputy Attorney-General, for the Crown.

G. A. Eakins, for the accused.

WINNIPEG, May 1, 1912.

THE COURT held that the question should be answered in the negative, but refused to grant a new trial as asked for by the Crown, holding that the evidence was not such as to warrant a new trial being granted. Moreover, the accused had been tried once, and the Court would not direct a second trial on the same state of facts as those on which he had been tried before.

Ruling below reversed, but new trial refused.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

THE KING v. HARRAN.

1. GAME LAWS (§ I—5)—JURISDICTION OF MAGISTRATE—GAME AND FISHERIES ACT, 7 EDW. VII. (ONT.) CH. 49.

The jurisdiction of the magistrate under the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, is not ousted unless the accused acted under a claim of right, which is reasonable as well as *bonâ fide*; it is not enough that the claim is honestly made, if it be in fact merely fanciful and imaginary.

[*Cornicall v. Sanders*, 3 B. & S. 206, followed.]

2. TRESPASS (§ I A—5)—WHAT CONSTITUTES—TITLE IN COMPLAINANT—OUSTER OF JURISDICTION.

A claim of title, to oust the jurisdiction of the magistrate in a case of trespass, must be a claim of title in the party charged, and not a mere allegation of a *jus tertii* or of a defect in the complainant's title.

[*Cornicall v. Sanders*, 3 B. & S. 206, followed.]

3. TRESPASS (§ I A—5)—WHAT CONSTITUTES—RIGHT TO HUNT AND FISH.

The fact that part of patented land is covered with navigable water gives no right to third persons to hunt and fish thereon.

DECIDED: April 18, 1912.

MOTION by the defendant to quash a magistrate's conviction for an offence against the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, sec. 25.

The application was dismissed.

G. P. Deacon, for the defendant.

D. L. McCarthy, K.C., for the prosecutor.

TORONTO, April 18, 1912.

MIDDLETON, J.:—There is no doubt, upon the evidence, that the accused entered upon the lands in question for the purpose of hunting and fishing thereon; and the Justices have found, upon ample evidence to justify the finding, that the lands were enclosed in the manner pointed out by sec. 25, sub-sec. 5, and that sign-boards forbidding hunting and shooting were placed, as required by sub-sec. 2 (b) and (c).

Upon the motion it was argued that the jurisdiction of the Justices was ousted by reason of what was done by the accused

being a bona fide assertion of right to hunt and fish, and the title to lands having been brought into question.

The Ontario statute under which this prosecution is taken contains no such provision as that found in the Petty Trespass Act, R.S.O. 1897 ch. 120, sec. 1, which excepts from its penal provisions "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of," as well as any case falling under the provisions of the Criminal Code.

The Criminal Code, sec. 540, provides that its penal provisions with respect to injury to property shall not apply to "any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of," and "any trespass, not being wilful and malicious, committed in hunting and fishing or the pursuit of game."

In many of the cases cited, the determination was under statutes containing some similar provision. But, quite apart from any statutory provision, the Courts have uniformly held that the jurisdiction of the magistrate is ousted where there is shewn to be a bona fide claim or dispute, and where the action of the accused is in assertion of a colourable claim. But in these cases, as said by Cockburn, C.J., in *Cornwall v. Sanders*, 3 B. & S. 206, "there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfies the Justices that there is some reasonable ground for his assertion of title;" and, a fortiori, upon a motion for a prohibition it is incumbent upon the applicant to satisfy the Court that he has at least a colourable claim of right, and that there is some real question. The jurisdiction of the Justices cannot be defeated by the mere assertion of some fanciful or imaginary claim. See also *Regina v. Davy*, 27 A.R. 508.

Counsel for the accused, in his elaborate argument, based his case upon two main contentions: first, that there was some defect in the prosecutor's title to the lands; and, secondly, that there was a colourable claim of right to fish and to shoot upon the navigable water which covers a portion of the lands patented.

The Cartwright Game Preserve is an incorporation under the laws of Ontario, and has the paper title to the lands, and is in possession. The suggested defect arises from the fact that there was some dispute at one time as to the township in which the lands were actually situated; a dispute which was ultimately placed at rest by the Legislature. It is said that this invalidated the sale for taxes, because the effect of this legislation was to declare that the land was not situated in Cartwright, which imposed the assessment, but in the township of Reach.

The other suggested defect arose from an entire misunderstanding of the facts. The accused thought that a registrar's abstract proved the title. It turned out that, at the date of the abstract, some of the title deeds had not been registered. I think this contention is completely covered by the case already referred to, *Cornwall v. Sanders*, 3 B. & S. 206, which determines that the claim of title to oust the jurisdiction of the Justices must be a claim of title in the party charged, and that the suggestion of a *jus tertii*, or of a mere defect in the complainant's title, is quite beside the mark.

The other objection seems to be equally unavailing. The Crown has patented the land. Part of the land is covered with water. This undoubtedly makes the land subject to the right of navigation; but, subject to this right, the ownership of the land is absolute. See *McDonald v. Lake Simcoe and Cold Storage Ice Co.*, 31 Can. S.C.R. 130. The fact that others have the right to navigate does not confer any title upon the accused to shoot in this game preserve.

The accused, also, before the magistrate, sought to shew a right to hunt and fish by reason of the fact that others had hunted and fished there for many years, and that he had also done so for a long time. This brings the case very close to the case already cited, where it was held "that the jurisdiction of the Justices was not ousted by the claim of a prescriptive right in gross to kill game upon the land, there being no colour for

such a claim." The same view appears to have been taken in *Reece v. Miller*, 8 Q.B.D. 626. The Irish decision, *Johnston v. Meldon*, 30 L.R. Ir. 15, is entirely consistent with this view. It is there held that the jurisdiction of the magistrates is ousted if there is a *bonâ fide* claim, but it is the duty of the magistrates to determine whether the claim is *bonâ fide*; and, upon finding upon this question, they should then decline to proceed farther. It may well be that they will not give themselves jurisdiction by an erroneous decision; but in this case the applicant has not satisfied me that he has a *bonâ fide* claim within the cases.

I quite believe that the accused is honest in making his claim. That, as I understand the rule, is not enough. There must be some shew of reason.

This case is not at all like *Rex v. Lansing*, 1 O.W.N. 186; as here it is shewn that the land was enclosed, and that sign-boards, as required by the statute, were placed, and that there is no doubt of the offence having been committed. While Mr. Justice Britton states that the title to land was brought into question, this was not essential to his judgment, nor does he deal at all with the aspect of the matter above indicated.

The application fails, and must be dismissed with costs.

Application dismissed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SUTHERLAND, J., IN CHAMBERS.

THE KING v. O'CONNOR.

1. SUMMARY CONVICTIONS (§ VII B—80)—LIQUOR LICENSE ACT—AMENDMENT OF CONVICTION.

An amendment may be made to a conviction under the Liquor License Act (Ont.) to state that the township was one in which there was, at the time, a by-law in force passed under section 141 of such Act prohibiting the sale of liquors by retail therein, and so cure the failure to mention that fact in the conviction as originally made, where the record returned to the Court by the convicting magistrates shewed that counsel for the accused at the trial admitted that such by-law was in force in that township.

2. INTOXICATING LIQUORS (§ III A—59a)—TELEGRAPH OPERATOR—PLACING ORDER FOR LIQUOR—LIABILITY.

Where it was shewn upon the trial of a telegraph operator for selling liquor contrary to law, that upon being asked if he had any liquor, he told his questioner that he had not, but that he could telegraph for a bottle, which he did, but signed the telegram with the name of the other party, and the bottle was sent to the latter who paid the accused therefor, the purchaser not knowing to whom to apply for the liquor and the accused taking an active part in the matter, it was sufficient to warrant the trial justice to conclude that the accused did receive an order for the liquor and that he placed it with the dealer.

3. INTOXICATING LIQUORS (§ I A—8)—LIQUOR LICENSE ACT (ONT.), SECS. 95 AND 102—TIME FOR LAYING INFORMATION—AMENDMENT.

Section 95 of the Liquor License Act (Ont.) requiring all information or complaints for the prosecution of any offence under the Act to be laid within thirty days after the commission of the offence, and sec. 102 of the same Act permitting a trial magistrate to amend or alter an information under the Act and to substitute for the offence charged therein any other offence under the Act must be read together and thus read do not permit a substitution in an information charging the accused with selling liquor without a license on a certain date, of a different charge on a different date at a time more than thirty days after the alleged commission of such different and substituted offence.

[*Res v. Ayer*, 14 Can. Cr. Cas. 210, 17 O.L.R. 509; *Res v. Guertin*, 15 Can. Cr. Cas. 251, 19 Man. L.R. 33, specially referred to.]

DECIDED: March 14, 1912.

AN application to quash a conviction made on the 13th January, 1912, by Justices of the Peace.

The application was allowed with costs.

J. Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J.:—The charge as originally laid in the information on the 27th December, 1911, was, that the accused did on the 27th November, 1911, "sell liquor without the required license." After one adjournment, the case came on for final hearing and disposition on the 8th January, 1912. On that date the information was amended so as to read that the accused "did on the 2nd day of December, 1911, canvass for or receive an order for liquor."

Three objections were taken to the conviction.

The first was, that, as made, it did not state that the offence was committed in a township in which a by-law had been passed under sec. 141 of the Liquor License Act. It appears that the conviction, when originally made and signed by the Magistrates, did not mention this fact. It also appears by a memorandum attached to the papers returned to the Court by the convicting Magistrates as the record in the matter, that "Mr. Clay admits that the local option by-law is in force in said township." Mr. Clay was counsel for the accused at the trial. Mr. Cartwright, the Deputy Attorney-General, had the conviction sent back, and thereupon the Magistrates appear to have added the following words: "Such township being one in which there was at the time a by-law in force passed under section 141 of the said Act prohibiting the sale of liquor by retail therein."

Under these circumstances, and with the admission of counsel aforesaid, I think the amendment was justified; and, if necessary, it could now be amended in the way it was.

The second objection was, that sec. 19 of the Act to Amend the Liquor License Laws, 6 Edw. VII. ch. 47, under which the amended information was framed, as amended by the Act to Amend the Liquor License Act, 9 Edw. VII. ch. 82, sec. 39, does not apply to a case such as this. The facts appear to be as follows. The accused is a telegraph operator at the village of Harrow. One Perry Lipps, having been told that he might be able to get some liquor through the accused, went to him and asked him if he had any liquor. He was told by the accused that he had not, but that he could telegraph up and get a bottle. A telegram was sent, in the presence of Lipps, by the accused, for a bottle of Imperial whisky, and it come down from Walkerville to Harrow by train, whereupon Lipps paid O'Connor \$1.25 for it, and received the bottle from him. Lipps says that he went to the station to get O'Connor to telegraph for the bottle of liquor for him, and intrusted him with the money to send for it, and

that the bottle came down addressed to him, Lipps, and he took it away. He did not know the name of the liquor merchant who supplied the bottle of whisky except from the shipping bill. I am inclined to think that, upon this evidence, and apart from any disposition of this case on the further objection to the conviction, with which I will deal later, it could be sustained. The liquor was got through O'Connor, who was active in the matter. Lipps did not know to whom to send. It does not appear upon the face of the proceedings that the telegram was sent in Lipps's name. An affidavit is filed by the accused's solicitor in which the following statements appear: "I acted for the defendant, and on his cross-examination I procured from the Canadian Pacific Railway Company's office the telegraph message which the witness Perry Lipps said was sent for him and which the witness acknowledged. I asked to put it in as an exhibit, but it was refused by the Justices. Hereunto annexed, marked exhibit A., is the telegram referred to. No reference to the same appears in the proceedings before the Justices." The telegram is made an exhibit to the affidavit and reads as follows: "Harrow, 12. 2. 1911. C. J. Stogell, Walkerville, Ontario. Please send me bottle Imperial whisky first train. Perry Lipps." Counsel for the Crown objected to the admission of this affidavit; but, even if it were admitted, I do not think it carries the case much farther. O'Connor assumed to hand over the bottle and take the pay for the liquor under the circumstances in question. I think he acted in the matter more than in the mere capacity of a telegraph operator. If Lipps had come there, and, without discussion, had written out the telegram himself and handed it to the operator, that might be a different matter. I think the evidence sufficient to warrant the Justices in the conclusion that O'Connor did receive an order and place it with Stogell.

But a third objection was taken to the conviction, on the ground that, when the amendment to the information was made on the 8th January, 1912, it was too late. Section 95 of

the Liquor License Act provides that "all informations or complaints for the prosecution of any offence against any of the provisions of this Act, shall be laid or made in writing (within thirty days after the commission of the offence or after the cause of action arose and not afterwards)," etc.

In this case the information was first laid on the 27th December for an alleged violation of the Act on the 27th November, 1911. The information was then amended on the 8th January, 1912, and a different and substituted charge laid for an alleged violation of the Act on the 2nd December, 1911. Section 104 provides as follows: "At any time before judgment, the Justice, Justices, or Police Magistrate may amend or alter any information, and may substitute for the offence charged therein any other offence against the provisions of this Act; but if it appears that the defendant has been prejudiced by such amendment, the said Justice, Justices or Police Magistrate shall thereupon adjourn the hearing of the case to some future day, unless the defendant waives such adjournment."

The contention of the accused upon this application is, that sec. 104 did not empower the Justices to amend the information in such a way as to substitute a different offence for the one originally charged, unless it were done within thirty days from the date of the commission of the offence, and in any event not so as to enable a different offence to be charged on a different and later date more than thirty days before said amendment was made. Here the amendment made on the 8th January, 1912, was long after thirty days from the time when the original offence was said to have been committed, viz., on the 27th November, 1911. It goes further, and states that the substituted offence was committed on a later date more than thirty days before the said amendment was made. There is no doubt that the offence substituted by the amendment is a different offence from that originally charged in the information.

Under these circumstances, had the Magistrates power, after the thirty days, to make the amendment in question? . . .

In the case of *Rex v. Ayer* (1908), 17 O.L.R. 509, 14 Can. Cr. Cas. 210, it was held that where upon the hearing of complaints upon two informations for breach of section 78 of the Liquor License Act as amended by 5 Edw. VII. (Ont.) ch. 30, sec. 1, in selling liquor to minors, the justices amended by inserting in the information the necessary allegation that the parties to whom the liquor was sold were "apparently or to the knowledge of the defendants under the age of 21 years" that under sec. 104 of the Act, the justices had power to amend notwithstanding that 30 days had elapsed from the date of the commission of the offence charged.

The headnote contains the query:—

Whether in view of sec. 95, this would have been permissible if the amendments had substituted other and different offences for those charged in the informations?

At p. 512 (17 O.L.R.), Meredith, C.J., who delivered the judgment of the Divisional Court, is reported as follows:—

The other power conferred by sec. 104 of substituting for the offence charged in the information, any other offence against the provisions of the Act indicates clearly, I think, that the altering or amending of a defective information by remedying the defect in it was not thought or intended to be treated as a substitution of another offence for the offence charged. In other words, that though it may be that sec. 95 would prevent the substitution of another offence by an amendment made after 30 days from the time of its commission, as to which I express no opinion, there is no such bar to the amendment of a defective information by the adding to it of some statement necessary to constitute the offence which it did not contain.

The Court of Appeal of Manitoba in a case of *Rex v. Guertin* (1909), 15 Can. Cr. Cas. 251, 19 Man. L.R. 33, held as follows:—

An information under sec. 168 of the Liquor License Act, R.S.M. 1902, ch. 101, for furnishing liquor to an interdict, discloses no offence unless it alleges that the defendant had knowledge of the interdiction, and it becomes a new information if amended by introducing such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed on the amended information, and a conviction based upon it will be quashed on proceedings by *certiorari*.

These two judgments are not in accord. In *Rex v. Ayer*,

14 Can. Cr. Cas. 210, 17 O.L.R. 509, the effect of the amendment allowed was, as stated in the judgment of Meredith, C.J., at p. 512, "merely to add words necessary to describe the offence intended to be charged in the informations which were insufficiently because incompletely described in them." See also *The Queen v. Hawthorne*, 2 Can. Crim. Cas. 468.

I think the two sections of the Act must be read together, and, so reading them, have come to the conclusion that the amendments made to the information in the present case on the 8th January, 1912, substituting a different charge on a different date, more than thirty days after the alleged commission of such different and substituted offence, were not properly made. I think they were made too late. The original charge was apparently abandoned, and the substituted charge laid too late under the statute.

The motion will, therefore, be allowed with costs. The usual order will go for the protection of the Magistrates.

Application allowed.

[COURT OF KING'S BENCH, QUEBEC.]

(Appeal Side.)

BEFORE ARCHAMBEAULT, C.J., TRENHOLME, CROSS, CARROLL, AND
GERVAIS, JJ.

THE KING v. MANCONI.

1. **NEW TRIAL (§ IV—31)—NEWLY DISCOVERED EVIDENCE—REFUSAL TO RECALL JURY.**

When new facts of an essential nature have been discovered by the defence in a criminal trial before verdict rendered, even after the Judge has charged the jury and the jury has retired to deliberate, the jury should be recalled to hear this additional evidence, and a new trial will be granted where the jury has not been allowed to hear such additional evidence.

2. **APPEAL (§ I C—25)—CRIMINAL CASES—NEWLY DISCOVERED EVIDENCE—PRACTICE.**

A Court of criminal appeal has the right to order a new trial when new evidence discovered before the rendering of the verdict is not allowed to be placed before the jury. After verdict rendered, however, only the Minister of Justice could order a new trial.

DECIDED: March 30, 1912.

MOTION for a new trial after a verdict of manslaughter.

The motion was granted.

Alban Germain, for the prisoner.

J. C. Walsh, K.C., for the Crown.

The opinion of the Court was delivered by

ARCHAMBEAULT, C.J.:—This is a motion for a new trial. The prisoner was placed on trial on an indictment for murder committed on November 11, 1911, on the person of one Santini. He was found guilty of manslaughter.

After the jury had retired and whilst they were deliberating, counsel for the prisoner learned that two witnesses that had not been heard and had been present at the affray were in the possession of very important facts unknown to counsel and to the jury, when these retired to deliberate. The Judge presiding at the trial was immediately informed of this, and application made to have the jury recalled and the witnesses heard. The Judge replied that it was too late for him to do anything as the case was in the hands of the jury.

As I said, the jury brought in a verdict of manslaughter. The prisoner then moved for a new trial and Mr. Justice Lavergne allowed him to lay this motion before the full Bench.

In this motion the prisoner alleges that, after the charge of Mr. Justice Lavergne and whilst the petty jury was deliberating on the verdict to be rendered, the accused for the first time learned of the existence of two eye-witnesses of the tragedy at which accused was charged with having committed the offence for which he was on trial, to wit, Alfred Maréchal and Georges Maréchal; that the evidence of these witnesses was of such a nature as to modify the verdict of the jury, and induce them to bring in a verdict of not guilty; and that counsel for prisoner immediately acquainted the Court with these facts and requested that the witnesses be heard at a new trial.

The motion is supported by the affidavit of Mr. Alban Germain, counsel for the accused, who declares that he only learned of the existence of these two witnesses after the Judge had charged the jury.

The motion is also supported by the sworn declarations of the two witnesses in question.

Alfred Maréchal declares that he lives in the rear of the yard where the tragedy occurred on November 11, 1911; that he saw, that evening, a man fire a revolver shot at another. After the first shot the combatants went towards St. James street. He followed them, and, just before arriving at St. James street, he heard two other revolver shots, but cannot say who fired them. Arriving on St. James street he saw three men, two of whom were running away towards a lane, and the third in another direction, which he doesn't remember.

He adds that when he saw Manconi in Court it was for the first time that he saw him, and that the prisoner is not the person he saw firing a revolver on November 11th.

Georges Maréchal declares that on the evening of this tragedy he heard revolver shots and went out of his dwelling, which is next to that of Alfred Maréchal. He saw a man striking another with a knife and then run away; and he adds that Manconi, whom he saw in Court, is not the man who struck with the knife.

Annexed to the motion is a declaration signed by eleven of the petty jurymen who rendered a verdict against Manconi to the effect that they have taken communication of the affidavits of Alfred Maréchal and Georges Maréchal and that had the facts mentioned therein been laid before them at the trial they would have been of a nature to modify their verdict.

Finally, Mr. Justice Lavergne has made a report containing an analysis of the evidence adduced at the trial and of the procedure followed. He ends his report by stating that the evidence offered would probably have had an influence on the opinion of the jury and that he would have granted a new

trial if he had been of opinion he had jurisdiction to do so. This report also mentions the fact that counsel for the accused drew the Court's attention to the discovery of new evidence before verdict rendered and during the deliberations and prayed for a new trial.

The motion for a new trial now submitted to us was presented to Mr. Justice Lavergne immediately after the verdict had been rendered and the Judge has practically referred the same to this Court for adjudication.

Under the circumstances we are of opinion that we can grant a new trial and that we ought to grant it.

Were the demand based on new evidence discovered since the rendering of the verdict, I, for one, am of opinion that we could not intervene. Only the Minister of Justice would have this power. But in the present case the new evidence was discovered before the end of the trial, before verdict, and we are of opinion that the trial Judge had the power and the right to call back the jury in order to hear the new witnesses.

We, therefore, treat the question as a sort of reserved case submitted to us by the trial Judge, and applying the dispositions of art. 1018 of the Criminal Code, which says that the Court of Appeal may order in such a case a new trial or render any other order as justice may require, we believe that the ends of justice require a new trial, and, therefore, we grant the motion of petitioner.

New trial ordered.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, AND
MAGEE, JJ.A.

THE KING V. BRITNELL.

1. EVIDENCE (§ XII L—987)—CRIMINAL CASES—CHARACTER—REPUTATION
—EXTENT OF BUSINESS—REASONABLE DOUBT.

While neither the character, reputation, or extent of one's business, constitutes a reason why he should not be convicted of a criminal offence, or punished if guilty, yet they all have weight in considering the probability of the truth of the charge, and a bearing upon the question whether there was reasonable evidence of guilt, as well as upon the fact whether he was guilty or innocent.

2. OBSCENITY (§ I—5)—SELLING OR EXPOSING FOR SALE OBSCENE BOOKS—
KNOWLEDGE OF ACCUSED—CRIMINAL CODE (1906), SEC. 207.

In order to warrant a conviction under sec. 207 of Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 and 9 Edw. VII. ch. 9, for selling or exposing for sale an obscene book, it must be proved that the accused was aware of its obscene character and that it was sold or exposed for sale with his knowledge.

[*Rea v. Beaver*, 9 O.L.R. 418, 9 Can. Cr. Cas. 415, referred to.]

3. INDICTMENT, INFORMATION, AND COMPLAINT (§ II B—10)—SUFFICIENCY
OF ALLEGATION—KNOWLEDGE—SELLING OR EXPOSING FOR SALE OB-
SCENE BOOKS—CRIMINAL CODE (1906), SEC. 207.

In an information for exposing for sale and selling obscene books under sec. 207 of Crim. Code (1906), as amended by 8 and 9 Edw. VII. ch. 9, it is necessary to allege that it was knowingly done, and an allegation that it was done "contrary to law" and "contrary to the form of the statutes," is not sufficient.

4. INDICTMENT, INFORMATION AND COMPLAINT (§ II E 3—40)—DESCRIPTION
OF OFFENCE OF SELLING OR EXPOSING FOR SALE OBSCENE BOOK—AB-
SENCE OF "KNOWINGLY" FROM INFORMATION.

A person cannot be summarily convicted by a magistrate under sec. 207 of the Crim. Code, which declares that it is an indictable offence to "knowingly . . . sell, or expose for sale" any obscene book, upon an information which did not charge that he "knowingly" exposed for sale or sold such book.

5. OBSCENITY (§ I—5)—SALE OF OBSCENE BOOKS—PURCHASE BY CLERK
WITHOUT KNOWLEDGE OF ACCUSED—STOCK CELLAR.

The owner of a book store containing thousands of books, cannot be convicted of knowingly exposing for sale an obscene book under sec. 207 of the Crim. Code, where a few copies which had been purchased by a clerk without the defendant's knowledge, were found in a cellar where stock was kept, and to which the public was not admitted.

6. OBSCENITY (§ I—5)—SALE OF OBSCENE BOOK—ABSENCE OF KNOWLEDGE
OF CONTENTS OF BOOK.

The proprietor of a book store cannot be convicted, under sec. 207 of the Crim. Code, of knowingly selling an obscene book, where he did not have knowledge as to the contents of the book, a few copies of which had been, without his knowledge, purchased by a clerk and kept among stock in a cellar to which the public was not admitted.

7. EVIDENCE (§ II E 5—166)—PRESUMPTION AS TO KNOWLEDGE—SALE OF OBSCENE BOOK—RETURN OF COPIES TO PUBLISHER.

Knowledge of a dealer in books, who had a stock of 150,000 to 250,000 volumes, of the obscene character of a book, cannot be inferred from the fact that a clerk had, without his employer's knowledge, ordered a few of them and sold one, and that the defendant had, about a year before, upon receiving a few copies of such book, without reading one of them, returned them to the publisher because he had heard that the book was immoral.

DECIDED: April 4, 1912.

CASE stated by one of the Police Magistrates for the City of Toronto.

The defendant was convicted upon an information charging that, in the month of April, 1911, he, the defendant, contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided.

Section 207 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 & 9 Edw. VII. ch. 9, provides:—

Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse —(a) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph.

The stated case was as follows:—

“Pursuant to the order of the Court of Appeal dated the 15th May, 1911, I submit the following questions for the consideration of the Court:—

“1. Was there evidence upon which the defendant might be convicted of the offence of selling obscene books, within the intent and meaning of sec. 207 of the Criminal Code?

“2. Was there any evidence upon which the defendant might be convicted of having knowingly sold or exposed for sale obscene books, within sec. 207 of the Criminal Code?”

George Wilkie, for the defendant, argued that it had not been proved that the books had been exposed for sale or that they were obscene, or that they were sold or exposed for sale with the defendant's knowledge, or that the defendant knew of their obscene character. These were essentials of the case for the prosecution: *Rex v. Beaver* (1905), 9 O.L.R. 418, 9 Can. Cr. Cas. 415. On the question of obscenity, he referred to *Burbidge's Digest of the Criminal Law of Canada*, pp. 163 and 164, especially the note at the foot of the latter page.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, contended that the defendant had been rightly convicted. There was sufficient evidence to establish that the defendant had knowledge that the books were on sale and were sold and that they were obscene. On the question of obscenity they referred to *The Queen v. Hicklin* (1868), L.R. 3 Q.B. 360; *People v. Doris* (1897), 14 App. Div. N.Y. 117; *People v. Muller* (1884), 96 N.Y. 408; *State v. McKee* (1900), 73 Conn. 18; *United States v. Bennett* (1879), 16 Blatchf. (Circuit Court) 338; *Rex v. Key* (1908), 1 Cr. App. R. 135.

Wilkie, in reply.

April 4, 1912. MEREDITH, J.A.:—The convicted man is a reputable book-seller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, nor the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

The charge against him seems to have been a double one in two senses, exposing for sale and selling two different obscene books; but no question is raised in that respect; the conviction

seems to have been in accordance with the charge, as if of one offence only.

The offence is one against morality, and one of a despicable character; the maximum punishment of which is two years' imprisonment; and it must be "knowingly" committed, "without lawful justification or excuse."

Assuming the books to have been sold, or exposed for sale, and to have been obscene books, which is assuming a good deal in favour of the prosecution, two other essential things must have been proved against the accused before he rightly could have been convicted: (1) that the books were sold or exposed for sale with his knowledge; and (2) that he knew of their obscene character. This is but a reasonable provision of the law; if it were otherwise, the lot of a book-seller, however honest and anxious to avoid anything like offending morality, would be a hard one; and especially hard upon one who carries a stock of a quarter of a million volumes, as one of the witnesses thought the accused does.

Neither book was manifestly or notoriously obscene or immoral; and it may be that neither is in that respect better or worse than a great number of books which are freely sold and read everywhere; and there is, I should think, nothing in either of them to make them very attractive to any one; and the small profit to be derived from their sale is hardly such as would induce a large dealer to conceal them in his cellar, so that he might sell them with less chance of being found out, and to sell them with the possibility of two years' imprisonment in the penitentiary before his eyes.

There was no sort of evidence of any exposure of them for sale; and there, manifestly, should have been a finding of "not guilty" to that extent; but there was not; on the contrary, there seems to have been a conviction in respect of which the penalty imposed was to some extent imposed.

Nor can I think that there was any reasonable evidence of a guilty knowledge on the part of the convicted man of the sale

which was made, and which was of one of the books only, or of its obscene character, if it really has any.

It is quite plain that, in the extensive business of the convicted man, the books in question might have been bought and sold without his knowledge; he did not attend to the department in which such books, that is, "works of fiction," are sold. He testified that he did not know that there were any such books in his establishment; that he had a year or more before found invoices of them and returned them, because, from what he had heard, he thought their tendency was suggestive, and so did not want to sell them. There is not a word of testimony to the contrary of this; the most that can be said is, that, if dealing with a man who might be thought untruthful and tricky, there were some circumstances of suspicion, a book having been sold and other books having been found in the cellar; things which are not unsatisfactorily explained by the witnesses for the prosecution. But no one, much less a reputable man doing an extensive reputable business, is to be convicted on suspicion merely; when there is no more than that against him a verdict of "not guilty" should be entered. The statement that, from what he had heard, he thought their tendency suggestive, is a good way removed from an admission that he knew that they were obscene.

The cases which were referred to on the argument here were very different from this case; in them the obscene character of the writings was manifest, and in some of them it was the author who was prosecuted and who had sold them.

In a case of this character, where there may be different opinions as to the immorality of a book, which is being generally sold here and in other countries or another country, it would seem to me to be the better course for those who object to its sale on that ground, to give notice of such objection to such a book-seller as the convicted man is, and to prosecute only if the objection is not heeded. No such book-seller can have any reasonable desire to sell such books as those in question, if they be obscene, for all there is in it for him, at the risk of being branded

as a criminal and sent to penitentiary for two years, after first perjuring himself in the hope of escaping conviction.

I would answer the second question in the negative and direct that the accused be discharged.

MAGEE, J.A.:—The two questions stated by the Police Magistrate under the order of the Court for its opinion refer only to sec. 207 of the Criminal Code, 1906, under which he had professed to convict. That section, as amended in 1909, declares that every one is guilty of an indictable offence “who knowingly, without lawful justification or excuse,—(a) makes, manufactures, or sells, or exposes for sale or to public view . . . any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals.” In the information laid against this defendant it was charged only that in the month of April, 1911, he, “contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided.” It was not charged that he did it either knowingly or without justification or excuse. It was necessary to allege that he did it knowingly to bring it under that section. The information was not amended. He, therefore, was not charged with any criminal offence under that section. The words “contrary to law” and “contrary to the form of the statute” do not make up for the absence of that allegation of knowledge.

In the formal conviction, however, the words “knowingly” and “without lawful justification or excuse” are inserted in setting out the offence, which is otherwise described as in the information, except that the word “morals” is substituted for “public morals;” and the word “obscene” for “indecent and obscene.”

In his statement of the case for this Court, the learned Police Magistrate says: “The defendant elected to be tried summarily and pleaded not guilty. After hearing evidence, I was of the opinion that the charge was proved, and accordingly convicted the defendant, being satisfied that the books were obscene, and

that the defendant knew that they were on sale in his establishment." It is not specifically stated whether or not the Police Magistrate was satisfied that the defendant knew of the books being obscene, and we are as to that left to the inference to be drawn from the fact that he made the conviction. In his reasons for his decision, given at the time, he said, "The section of the Code under which this prosecution is brought is 207."

It would, therefore, appear that the defendant was convicted of an offence with which he was not charged and for which he had not consented to be tried summarily.

As the charge was laid "*contra formam statuti*," and was dealt with under sec. 207, and the questions propounded refer only to that section, it is unnecessary to consider how far, at common law, a book-seller charged with selling and publishing an obscene libel, sold by his clerk in the course of his business, could shelter himself by his want of knowledge of the sale, or of the contents, or how far either must be brought home to him.

Dealing, then, with the case as one under sec. 207, there must be shewn knowledge of the sale or exposure for sale, and also knowledge of the character of the book. That the latter must be shewn was held by this Court in *Rex v. Beaver*, 9 O.L.R. 418, 9 Can. Crim. Cas., 415.

The former is also manifestly necessary. An auctioneer selling a library, or shelf or package of books, might not know what books it contained. Objectionable articles may be made or sold in a factory or shop; and, while the statute would be futile if the proprietor could escape because they were not made or sold directly by himself, but by his employees, though with his knowledge, it might also cause injustice if he could be punished because the making or selling was done for his benefit by his employees, though without his knowledge or consent, or even against his orders.

The only books specifically referred to in the evidence are three recent novels, which, for brevity, I may refer to as X, Y, and Z. There were, indeed, other books found along with these three in the cellar of the defendant's shop, but the Police Magis-

trate does not name them, and merely says that some of them were of the same type, and some of them he had looked through sufficiently to see that they all were more or less within the scope of the test of obscenity.

Apart from evidence as to the character of the three books, X, Y, and Z, the prosecution contented itself with proving that a copy of Y had been bought on the 6th April at the defendant's shop from a clerk who brought it from the cellar; and that on the 8th April a Police Inspector went to the shop and there saw the defendant, who said that he had not a copy of X or Y; but the Inspector says, "On searching, we found," in a box in the cellar, eleven copies of X and thirteen of Y, besides other books, including one or more copies of Z, and that, in the defendant's presence, his clerk said that he had been selling the book Y, and he thought that the defendant knew it. It is not stated whether the defendant made any remark thereupon. Indeed, it is not said that he heard it. He was not asked about it when called in his own defence, and he did not refer to it.

It is not shewn that any of the public or customers were ever admitted to the cellar. There was, therefore, no evidence of exposure of any of the books for sale, and only proof of a sale of one copy of one book, Y, by the clerk, and no proof of the defendant's knowledge of the contents of any of the books. Z and the other unnamed books are not further spoken of, and may be left out of consideration.

For the defence, the defendant himself and four of his clerks gave evidence. It appears that his stock contains 150,000 to 250,000 books, of which 4,000 to 7,000 are kept in the cellar in stock. A clerk says the whole place is full of books, and another, that he "put the boxes of books down the cellar, and especially as at Christmas time there was not room for as much stock." The defendant says that in the cellar he has in stock a theological library and cook-books and other books that he has not room for in the shop. One department of the business is that of dealing in old or antiquarian books. One of his clerks, Appleton, who states that he looks after the sale of

the new books, says that X came out in 1907, "and was sold by other dealers here before we had it." "We sold a great many copies till lately, and now we would not sell more than one a month or so." The defendant, himself, testified that he did sell them when they first came out, but "a year or more ago" he found in the invoices a shipment of X and Y, and he returned the books, as from what he heard he thought the tendency of the books was suggestive, and so did not want to sell them; and he did not know, when the Police Inspector asked him about them, that he had a copy of either, and he had not read X nor Y, "nor such books." A clerk also testifies that, "a year ago or so," the defendant returned a shipment containing X and Y, "because they were not, I think, the class of books he desired to sell."

Even if we take these statements as going far enough to shew that the defendant knew that the books were obscene or such as tended to corrupt morals, it is evident that there is here no proof of a sale with his concurrence after he had learned of the objectionable character of the books.

Then it appears from the evidence of Appleton, who has charge of the sale of the new books, that "a year ago we got some twenty-five copies of each of these two books," X and Y, and "those found by the police were the remainder of that order." The invoice containing Y seems to have been produced by the witness before the Police Magistrate, but is not among the papers sent to this Court, and the exact date of it does not further appear. Appleton says: "The defendant probably did not know that I had ordered these books, as I am in charge of that branch." Another clerk says that the defendant is at the office in rear, and does not know what new books are in stock. Another says: "The whole place is full of books, 250,000 I would think. Appleton and I are in charge of the front of the shop. The defendant is at the office in rear, and looks after the old books. . . . The defendant does not know just what books we have bought, nor all we have in stock." Another clerk, Congdon, who says he is in charge of the antiquarian books, says that the defendant also looks after that de-

partment, and the defendant does not know what new books are in stock. The defendant, himself, says: "I am at the back of the shop, where the branches of the business I look after are situated: I do not attend to the new novels at all." He says that the clerk who ordered the last copies of these two books was in his employ when he returned the shipment, but he only remembered telling Congdon of having sent the shipment back, and he, Congdon, would have nothing to do with ordering these books—"they would likely be ordered by Appleton."

Bearing in mind the extent of the defendant's business, and the fact that the prosecution proved only one sale—and that by a clerk—of one book, without shewing that the defendant had any knowledge of its contents, can it be said that this evidence given for the defence affirmatively establishes knowledge by the defendant that this small order for these books had been given by his clerk, after he himself had sent back a shipment of these very books on account of their character? It may be said that, even taking the evidence for the defence, it is not absolutely clear that the defendant did not know of his clerk's order, whether at the time or afterwards, or of the receipt of the books thereunder, even though he thought that all had been sold; but it was for the prosecution to establish knowledge, not for him to shew want of knowledge; and, if the prosecution had had doubts upon the subject, it could have been cleared up by cross-examination. That not having been done, there was, in my opinion, failure of proof of knowledge of the sale, even in the sense of implied or tacit authority or consent to it; and, therefore, the second question should be answered in the negative.

It is unnecessary to answer the first question, as it becomes merely academic when the second is answered in the negative. No specific parts of any of the books have been referred to in the information, the conviction, the evidence, or in the argument. The statement by the Police Inspector as to the contents of X and Y was conceded to be at best inaccurate. No particulars seem to have been asked for by the defence, or delivered. The result would be that it would be necessary for the Court to

peruse the books seized to see if it could discover any objectionable page, phrase, or sentiment, before it could answer the question propounded. In a sense this would be to ask the Court to be accuser instead of Judge. It is a course which should not again be adopted.

The defendant, on the evidence, should, in my opinion, have been acquitted, and the conviction should be declared invalid.

Moss, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

Conviction quashed.

[COURT OF SESSIONS OF THE PEACE, QUEBEC.]

BEFORE THE HONOURABLE C. LANGELIER, J.S.P.

THE KING v. BOUCHARD.

1. HABEAS CORPUS (§ I B—7)—WHEN PROPER REMEDY.

Habeas corpus, and not an application to a magistrate for the release of a person remanded by him to custody, is the proper mode of inquiry as to whether his detention was illegal.

2. CRIMINAL LAW (§ II H—85)—PROCEDURE—DETERMINING SANITY OF ACCUSED—REMAND IN ABSENCE OF ACCUSED—CAN. CRIM. CODE (1906) SEC. 722, SUB-SEC. 4.

Where a person was brought before a magistrate upon a written complaint for an assault upon his wife, who, in her deposition, swore that the accused had twice been confined in an insane asylum, and that since his release therefrom he had continually threatened her with death, and the magistrate remanded the accused to gaol after directing an examination to be made by experts as to his sanity, the magistrate has discretion under sub-sec. 4 of sec. 722 of the Crim. Code (1906), eight days later, on their report not having been made, to sign another remand in the absence of the accused.

[*Re Sarault*. 9 Can. Crim. Cas. 448, distinguished.]

DECIDED: June 20, 1912.

AN application on behalf of the prisoner for his release from custody on the ground that the second remand by the magistrate was signed in the absence of the prisoner.

The motion was refused.

J. E. Bedard, K.C., for the Crown.

Oscar Morin, for the prisoner.

LANGELIER, J.:—The defendant was arrested for assault upon the complaint of his wife. In her deposition she swears that on two occasions, namely, in 1907 and in 1910, her husband was confined in a lunatic asylum and that since he has left it he has constantly threatened her with death, when on the 27th of May he assaulted her.

When arrested the accused appeared before me and I ordered to send him to gaol upon a written remand and at the same time I also ordered that he should be examined by medical experts as to his sanity. Eight days after, the experts not having made their report, I signed another remand, without the actual presence of the accused, because the medical experts had not yet made their report.

The counsel for the defence made a motion to have his client liberated, based upon the ground that the second remand was signed in his absence.

The rule for remand is fixed by art. 722 of our Criminal Code (1906) at sub-sec. 4, it is said:—

4. Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large, or may commit him to the common gaol or other prison, etc., or to such other safe custody as such justice think fit.

It was argued by the defence that the detention of the accused was illegal and that my jurisdiction was exhausted. And to support that contention the case of *Re Sarault*, 9 Can. Crim. Cas. 448, which is pretty much like the present one, was cited. However, in that case the defence had proceeded by way of *habeas corpus*, which is the proper mode of ascertaining whether the accused is illegally deprived of his liberty.

In the case of *Re Sarault*, 9 Can. Crim. Cas. 448, the facts were not the same as in the present one. When arrested the accused had given signs of insanity, and the magistrate, informed of these facts by the constables, had remanded the prisoner without the latter being brought before him, and ordered a medical examination.

The Court of King's Bench presided by the late Mr. Justice Hall based their decision to liberate the accused upon that ground.

Although, said Judge Hall, the motive of the magistrate in remanding the prisoner was a commendable one, yet there was an absence of a condition which appears to me to involve a principle of safeguard of the highest importance for the liberty of the subject, the order was made upon verbal, unsworn statements, presumably of constables, and not within the hearing and view of the accused, who, in reality, was neither confronted with a complainant or seen by the magistrate.

In the present case it was quite different; I had before me the affidavit of the wife, in which it was stated that twice her husband had been sent to a lunatic asylum and that since he had been out he had constantly threatened her with death, till he assaulted her on the 27th of May last.

Upon that complaint I issued a warrant and the accused was brought before me and I ordered that he should be sent to gaol to be examined by medical experts, which order appears on the face of the record. At the expiration of eight days I signed another remand, which was unnecessary, because the accused was kept in virtue of a sentence, i.e., the medical examination.

Our Code gives some latitude in such a case, when it says "or to such other safe custody as such justice think fit."

I am of opinion that the only mode of verifying if a person is detained illegally, is by *habeas corpus* and not by a motion.

The counsel for the defence has contended that my jurisdiction was exhausted. If such is the case how could I order the liberation of the prisoner? Upon a writ of *habeas corpus* the Judge might give such an order. Motion dismissed.

Application refused.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE RIDDELL, J., IN CHAMBERS.

THE KING v. LAPOINTE.**1. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINING SEPARATE OFFENCES—EVIDENCE RELEVANT TO SOME ONLY.**

Upon more than one information for separate offences of a similar character being lodged against a person a magistrate should not hear evidence at the same time as to all the charges, where some of it would be relevant to one, but not to the others.

[*Hamilton v. Walker*, [1892] 2 Q.B. 25; *Regina v. Fry* (1898), 67 L.J.Q.B. 67; *Regina v. McBerny* (1897), 3 Can. Cr. Cas. 339, 29 N.S.R. 327; and *Rex v. Burke* (No. 2) (1904), 8 Can. Cr. Cas. 14, followed; *Rex v. Dunkley* (1910), 1 O.W.N. 861, and *Rex v. Sutherland*, 2 O.W.N. 595, distinguished.]

2. SUMMARY CONVICTION (§ III—30)—PROCEDURE—SEPARATE INFORMATIONS—HEARING EVIDENCE IN THREE CASES—QUASHING CONVICTION.

A conviction for selling liquor without a license will be quashed where the magistrate before whom three informations were lodged charging sales to different persons, heard evidence at one time tending to prove sales in the three cases, some of which were not relevant to the case in which the accused was convicted.

3. INTOXICATING LIQUORS (§ III 1—91) — UNLAWFUL SALES — TRIAL OF OFFENDER—THREE INFORMATIONS—HEARING EVIDENCE AT ONE TIME.

A conviction for selling liquor without a license will be quashed, where a magistrate with whom three informations were lodged against the accused for separate sales to different persons, heard evidence at the same time tending to prove the three offences, and found the accused guilty in all three cases.

4. JUSTICE OF THE PEACE (§ II—6)—EXEMPTION FROM LIABILITY — EXPLANATION OF CONDUCT—ORDER FOR PROTECTION.

Where a magistrate, a King's Counsel, with whom three informations were lodged charging a person with separate sales to different persons of liquor without a license, heard, at the same time, evidence tending to prove the three offences, if he fails to explain his conduct, upon one of the convictions being quashed, an order of protection will be granted him only upon payment by him of the costs.

DECIDED: June 22, 1912.

MOTION by the defendant to quash a conviction made against him by the Police Magistrate at Thessalon for selling intoxicating liquor without a license.

The conviction was quashed.

H. S. White, for the defendant.

J. R. Cartwright, K.C., for the Crown.

RIDDELL, J.:—On the 9th November, 1910, one Grigg laid three informations against Louis Lapointe for selling liquor without a license, on the 29th October then ultimo, to (1) B. Guertin, (2) Joseph Dubie, and (3) Edward Dubie, respectively.

The defendant appeared before the Police Magistrate at Thessalon; the Police Magistrate read to him the informations one by one; and the defendant pleaded "not guilty" to each. Thereupon the Police Magistrate took the evidence of witnesses, B. Guertin, Joseph Dubie, and Edward Dubie for the prosecution, and others for the defence, the evidence being taken down on paper headed:—

"Deposition of a Witness.

"Canada

"Province of Ontario

"District of Algoma

"To wit:—

"The deposition of——— taken before the undersigned Police Magistrate for the said district of Algoma this 18th day of November in the year 1910, at Cutler, in said district of Algoma, in the presence and hearing of Louis Lapointe, who stands charged that he did, at or near the village of Cutler, in said district, on or about the 29th day of October, 1910, sell liquor without a license, as required by law."

There was ample evidence of the sales to Joseph Dubie and Edward Dubie. With some hesitation, I think there was sufficient to justify a conviction in the Guertin case also.

The Police Magistrate recorded a conviction in the Joseph Dubie case, and imposed a fine of \$100 and \$32 costs, and, in default of payment, three months' imprisonment.

It is sworn and not denied that at the same time he announced that he found the defendant guilty on the other two charges, but adjourned these two convictions for the purpose of fixing the fine thereon until a future day—and this must have been the case, as we find the magistrate writing the defend-

ant on the 1st December, 1910: "Having adjourned the two other cases against you for selling liquor without a license until to-day, I have this day come to the conclusion to simply allow the one fine to go which has been paid, on payment of the costs in the other two cases." He then states the amount of costs, and asks this to be sent him by return mail—"otherwise I will have to send the constable down."

The Police Magistrate told the solicitor for the defendant that all the evidence in the three charges is set out in the depositions forwarded, and that "the said evidence was utilised by him on each and all of the said charges."

A motion is now made to quash the conviction for selling to Joseph Dubie—the grounds taken in the notice of motion being: (1) that there was no evidence to support the conviction; (2) that, having three informations before him, the Police Magistrate proceeded to hear evidence in all three cases, and did then find him guilty in all three cases.

It is a well-established and well-known principle of the criminal law "that each case ought to stand on its own merits and should be decided on the evidence given with relation to that particular charge:" *per* Pollock, B., in *Hamilton v. Walker*, [1892] 2 Q.B. 25, at p. 28. And where the Justices had two informations before them, and, after hearing evidence on the one charge, determined to proceed with and hear the second, and, having so proceeded with and heard the same, thereupon convicted of the offence charged in the first, the conviction was quashed. So in *Regina v. Fry* (1898), 67 L.J.Q.B. 67, 19 Cox C.C. 135, 62 J.P. 457, it was held that it is contrary to the rules and principles of the criminal law that Justices should mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. In that case one of the Justices had been the Rt. Hon. Sir Edward Fry, "a great lawyer of long judicial experience;" and the Justices satisfied the Court that they applied to the case the evidence that was given in reference to it and to none other; and the conviction was sustained.

In our Canadian Courts the points has come up more than once: *Regina v. McBerny* (1897), 3 Can. Crim. Cas. 339, S.C. 29 N.S.R. 327; *Rex v. Burke* (No. 2) (1904), 8 Can. Crim. Cas. 14. The two cases in Ontario to which I have referred are not in reality against the view I have indicated. In *Rex v. Dunkley* (1910), 1 O.W.N. 861, there were in fact two informations, and both were before the magistrates; but the Court (Middleton, J.) held that one charge and one charge only was tried. In *Rex v. Sutherland*, before the same learned Judge, 2 O.W.N. 595, there was also only one charge tried—it being considered that the Crown might prove any number of sales on one day as constituting a selling on that day.

In the present case, the conviction is for selling to Joseph Dubie; and it is evident that all the evidence taken was heard on that charge and considered in determining the question of guilt upon that charge. I am not prepared to say that, if all the evidence given were applicable to that charge, the conviction must be quashed simply because the other informations were before the Police Magistrate, and evidence applicable to the three charges was heard: but, if any of the evidence could not be applicable to the Joseph Dubie charge, it is, to my mind, plain that the conviction cannot stand. This, I think, applies to all the evidence on direct, cross, or redirect examination, and whether for prosecution or defence.

Looking at the defence evidence, it would seem that the real defence is an alibi; there is nothing in that part of the evidence which is not applicable and admissible in the Joseph Dubie case.

In the Crown case, Joseph Dubie swears that it was the defendant who sold him the whisky; Edward Dubie swears that he was with him at the time, and that he, Edward Dubie, bought a bottle at the same time. He would not swear that it was not Louis Lapointe, as it was dark, and he did not know who it was. Remembering that the defence is apparently based upon the identity of the seller, I cannot say that this last statement was

inadmissible. Guertin does not seem to have been with the Dubies, and he says that the man who sold him the whisky was one of the Lapointes, he did not know which one, but he knew by the voice that it was one of the Lapointes—this was at 9.15. Joseph Dubie bought his liquor at about 8.30; the places were close together—or not far apart. Can it be said that this is not cogent evidence against the alibi set up? The defence and the only defence actually set up being that the accused was at Spanish at 8.50 (Modviski), 9.20 (John Foltz), 8.45 (John Smith), 8.30 (Louis McGregor), 6.30, 7.30, 9, and 10 (Simon Lapointe), 9.00 Peter Lapointe, 6.30, 7.30, and 9 (Joseph Lapointe), is it not competent to shew by witnesses that he was at Cutler that evening?

Notwithstanding all this, it may have been that the magistrate would not have accepted the statement of Joseph Dubie that he had bought whisky at all, had it not been sworn that two others had bought whisky the same evening. We are left in the dark as to this—the magistrate has not vouchsafed any explanation. In that view, as the sale to the two others is clearly not evidence of the sale to Joseph Dubie, I think the doubt should be resolved in favour of the defendant, and the conviction quashed.

As to costs and protection, it is the rule of the Court to go as far as possible for the protection of non-professional magistrates. But the present Police Magistrate is a lawyer and a King's Counsel; he has left us in the dark, and not (like that other lawyer Sir Edward Fry) explained his conduct (and it certainly needed explanation); the proceedings were very irregular; and I think the conviction should be quashed with costs to be paid by the magistrate; and that, on these being paid, an order for protection will go, but not otherwise.

Conviction quashed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., GARROW, MACLAREN, AND MAGEE, JJ.A., AND
LATCHFORD, J.

THE KING v. SOVEREEN.**1. JURY (§ 1 B 2—20)—WHEN RIGHT TO ELECT TRIAL WITHOUT A JURY EXISTS.**

The Criminal Code does not prescribe that an accused can elect to be tried without a jury when without a preliminary inquiry, or a committal, or an admission to bail, a bill of indictment has been preferred against him by the Crown Attorney with the written consent of a Judge of a Court of criminal jurisdiction.

[*The King v. Wener*, 6 Can. Cr. Cas. 406, followed.]

2. JURY (§ 1 B 2—20)—ABSENCE OF ELECTION—RIGHT TO TRIAL BY JUDGE WITHOUT A JURY.

If no election has been made before an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury and avoid a trial on the indictment.

[*The King v. Wener*, 6 Can. Cr. Cas. 406; *Rex v. Thompson* (1908), 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, dissented from.]

3. DISORDERLY PERSONS (§ I—5)—KEEPER OF BAWDY HOUSE—INDICTMENT—SUMMARY CONVICTION—CRIMINAL CODE, SEC. 239.

The offence, under Cr. Code sec. 228, of keeping a bawdy house, being punishable, upon indictment, there is no limitation of time for commencement of a prosecution for it by indictment, although the keeper is also declared by the Criminal Code, sec. 239, to be a loose, idle or disorderly person or vagrant, punishable in this character upon summary conviction, subject to the six months' limitation of Cr. Code 1142. (*Per Magee, J.*)

4. CRIMINAL LAW (§ II G 2—83)—PRIOR CONVICTION OF ANOTHER PERSON FOR SAME OFFENCE—KEEPING DISORDERLY HOUSE.

The fact that another person, who had been separately charged with the like offence, in respect of the same house, and at the same time, was convicted thereof, is no defence to an indictment for keeping a disorderly house.

5. CRIMINAL LAW (§ II A—49)—CONSENT OF JUDGE TO PREFER INDICTMENT—CRIM. CODE (1906) SECS. 871, 873.

Where the depositions and the committal for trial were both ignored by the prosecution, and instead, the County Crown Attorney, under Cr. Code sec. 873, obtained the written consent of the Judge to prefer the indictment on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty" and the depositions taken before the magistrate were not made a part of the case reserved for the opinion of the Court of Appeal in respect of the regularity of a refusal of a claim by the accused to be tried without a jury under the speedy trials clauses, the Court of Appeal may properly assume that the charge in the indictment is not the same as

that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment. (*Per Mac-laren, J.A.*)

DECIDED: March 6, 1912.

CASE stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereign, was indicted at the Sessions in December, 1911, for that he on the 23rd July, 1911, and on other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code, and was found guilty by the jury.

The indictment was not preferred at the instance of the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the Chairman, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, but before arraignment or plea, the prisoner desired to be allowed to elect to be tried before the County Court Judge without a jury, under the Speedy Trials sections of the Code. On its being held that he was not entitled so to elect, he pleaded "not guilty."

The Chairman, on the application of the prisoner's counsel, reserved for the Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?
2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?
3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

The conviction was affirmed; the first question being answered in the affirmative and the second and third in the negative.

J. B. Mackenzie, for the prisoner, argued that the evidence as to the character of the house under the previous occupant was inadmissible; and that, as the law now stands, a person out on bail is entitled to elect to be tried by a Judge without a jury: Criminal Code, sec. 825, sub-secs. 6 and 7, added by 8 & 9 Edw.

VII. ch. 9.* There is no reported case since the amendment of the Code by the statute of 8 & 9 Edw. VII. Reference was made to the following cases: *Rex v. O'Gorman* (1909), 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *The Queen v. Laurence* (1896), 1 Can. Crim. Cas. 295; *The King v. Komienksy* (1903), 6 Can. Crim. Cas. 524; *The King v. Wener* (1903), 6 Can. Crim. Cas. 406; *Regina v. St. Clair* (1900), 3 Can. Cr. Cas. 551, 27 A.R. 308; *Regina v. McNamara* (1891), 20 O.R. 489.

J. R. Cartwright, K.C., for the Crown, argued that the evidence was sufficient to support the conviction, and that the prisoner was not entitled to elect to be tried without a jury after a bill of indictment had been found against him.

March 6. Moss, C.J.O.:—We are all agreed that the questions submitted by the learned Chairman of the General Sessions should be answered adversely to the contentions made on behalf of the prisoner.

As to the first and second questions, having regard to the evidence and the charge to the jury, which are made part of the stated case, there can be no reasonable doubt.

The third question affords more room for difference of opinion—not, however, as to what the proper conclusion should be, but rather as to grounds upon which it should be based.

Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable

*6. A person accused of any offence within sub-section 1 of this section, who has been bound over by a Justice or Justices under the provisions of section 696 and is at large under bail, may notify the Sheriff that he desires to make his election under this Part, and thereupon the Sheriff shall notify the Judge, or the prosecuting officer, as provided in section 826.

7. In such case, the Judge having fixed the time when and the place where the accused shall make his election, the Sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceedings shall be the same as in other cases under this Part.

him to elect to be tried by a Judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by sec. 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827 (3).

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

And I do not think the legislation extends the right beyond that point.

I agree that the first question should be answered in the affirmative and the second and third in the negative, and that the conviction should stand.

GARROW, J.A., concurred.

MACLAREN, J.A.:—The accused in this case was tried at the General Sessions of the County of Norfolk before Robb, County Court Judge, and a jury, and was convicted of keeping a disorderly house. He had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the trial Judge, under sec. 783 of the Criminal Code. After a true bill had been found by the grand jury, and before arraignment or plea, the prisoner desired to elect to be tried before the County Court Judge without a jury, under the Speedy Trials Act (Part XVIII. of the Criminal Code). On its being held that he was not entitled so to elect, he pleaded "not guilty." At the close of the trial, the Judge, on the application of the prisoner's counsel, reserved for this Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?

2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?

3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

As to the first question, I am of opinion that there was ample evidence, if believed by the jury, to prove that the house in question was a disorderly house, and that he was the keeper. The house belonged to him and also the furniture, and he used it when working the farm with which it was connected, which was some two or three miles from his homestead. The evidence points strongly to his having been a joint occupant or keeper with the woman said to have been convicted in October, 1910, and to his being the sole keeper after that time, the house being occupied from time to time by disreputable women. The house retained the same character and reputation after October, 1910, as before; and the admissions made by the witness who did the chores about the house for the prisoner—and made very reluctantly—are quite sufficient alone to justify the conviction. This question should be answered in the affirmative.

As to the second question, what the trial Judge said in his charge on the subject was this: "It has been suggested that the woman who has been already convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you; and, if you come to the conclusion that the prisoner is the keeper or was at any time the keeper of this house, you should find him guilty, giving him, of course, the benefit of any doubt that you may have." I fail to see on what grounds the prisoner could properly complain of this charge. This question should, in my opinion, be answered in the negative.

The third question should also, in my opinion, be answered in the negative. Part XVIII. of the Criminal Code (secs. 822 to 842 inclusive), relating to "Speedy Trials of Indictable Offences,"

has reference exclusively to prosecutions based upon an information or complaint and a preliminary examination before a magistrate. It is true that there was in this case a preliminary examination before a magistrate, and the prisoner was committed for trial. But this was not followed up by an indictment based upon the charge for which he was committed, "or for any charge founded upon the facts or evidence disclosed on the depositions taken before the Justice," as might have been done under the provisions of sec. 871 of the Criminal Code. It does not appear from the reserved case whether or not the complainant before the magistrate was present at the Sessions; but, whether or not, the County Crown Attorney might prefer an indictment for the charge upon which the prisoner was committed or for any charge founded on the facts or evidence disclosed in the depositions: Criminal Code, sec. 872. The Deputy Attorney-General informed us at the argument that his instructions were, that no one was bound over to prosecute, although the reserved case would lead one to infer that some one had been so bound; but, in my opinion, in the circumstances of this case, this was quite immaterial.

The fact is, that the depositions and the committal were both ignored, and were not followed by the person bound over to prosecute, if there was such a person, or by the County Crown Attorney. Instead of this, the County Crown Attorney, under sec. 873, obtained the written consent of the Judge to prefer the indictment set out in the reserved case, on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty." The depositions taken before the magistrate were not made a part of the reserved case, and counsel for the prisoner did not, before us, ask or even suggest that they should be made a part of it. In the circumstances, we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment.

It is quite clear from sec. 825 and the succeeding sections of

the Code that a speedy trial before a Judge can be had only upon a charge on which the magistrate has committed the accused, or upon one which appears in the evidence before him. As said by Wurtele, J., in *The King v. Wener*, 6 Can. Crim. Cas. 406, at p. 413: "The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary inquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a Judge of a Court of criminal jurisdiction, or by order of such Court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other Court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it."

As stated above, the indictment in this case did not originate with and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

But, even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury. I agree with what is said by Wurtele, J., in the *Wener* case, at the page above cited. He there says: "If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury, and avoid a trial on the indictment." In another case of *The King v. Komiensky*, in the same volume, 6 Can. Cr. Cas., at p. 528, the same Judge says: "On the finding of true bills, the Court is finally seized with the prosecution, and exclusive jurisdiction over them is vested in the Court, which is the only competent

forum or tribunal to carry them in due course and in the ordinary way to their final stage of either conviction or acquittal by the petty jury." On the other hand, in a Manitoba case, *Rex v. Thompson* (1908), 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, it was held by Howell, C.J.A., that a prisoner may elect up to the time of pleading. I can find nothing in the Code to justify this position, and, in my opinion, it is quite contrary to the genius and spirit of the Speedy Trials Act (now Part XVIII. of the Code). I am of opinion that the correct doctrine is that laid down as above by Wurtele, J. To hold otherwise would be to defeat the very object and purpose of the legislation, and the title of "Speedy Trials" would become a veritable misnomer, and provisions that were designed and enacted to speed trials would be converted into machinery to retard and delay.

But there is also, in addition, another difficulty in the way of the prisoner. Having been bound over under sec. 696, and being under bail, if he desired to elect, he should have given the notice of such desire to the Sheriff, as required by sub-sec. 6, added to sec. 825 of the Code by the amending Act of 1909, 8 & 9 Edw. VII. ch. 9. This he did not do, so that he did not take the first step to secure such right. It may be said that this objection is a technical one. But, if the prisoner is claiming a privilege so much at variance with the spirit and object of the legislation, he should at least shew some compliance with the plain provisions laid down in the legislation.

For these reasons, and especially on the ground first set forth, which, in my judgment, is quite sufficient, I am of opinion that the third question should be answered in the negative.

MAGEE, J.A.:—Reserved case stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereign, was indicted before that Court in December, 1911, for that he, on the 23rd day of July, 1911, and on other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code. The jury found him "guilty."

Under sec. 228, this is an indictable offence. There is no limitation of time for the commencement of a prosecution for it. Consequently, it was open to adduce evidence such as was given, going as far back as May, 1910. It was objected that such evidence was inadmissible, because, under sec. 1142, in the case of an offence punishable upon summary conviction, the complaint must be made or information laid within six months, and under sec. 774 (amended by 8 & 9 Edw. VII. ch. 9) a "magistrate," as defined in sec. 771, could, without the assent of the accused, summarily try a person charged with keeping a disorderly house. But Part XVI., which includes sec. 774, relates to indictable offences, and not to offences punishable under summary convictions, which are dealt with by Part XV. The only provisions of the Code under which the keeper of a disorderly house or bawdy house can be punished by summary conviction are secs. 238 and 239, the former of which declares every one who is the keeper of such a house to be "a loose, idle or disorderly person or vagrant;" and sec. 239 makes "a loose, idle or disorderly person or vagrant" liable to fine or imprisonment or both. But that punishment is not for keeping the house, it is for being "a loose, idle or disorderly person or vagrant." In *The Queen v. Stafford* (1898), 1 Can. Crim. Cas. 239, although the charge was for being "the keeper of a common bawdy house," it is evident that the proceedings must have been taken under the sections then corresponding to secs. 238 and 239, and the imprisonment was held to be unauthorised by them. As the offence here charged is punishable only by indictment, sec. 1142 does not apply.

It was shewn that the defendant was the owner of the house in question, which was situate on a parcel of 45 acres of land owned by him. He resided about two and a half miles away. The house was "formerly occupied" by one Mrs. Denby. There is some reference to the fact of her having been arrested and convicted, but for what does not appear. Presumably it was for keeping this disorderly house. She left in October, 1910. During her occupancy, there is evidence of other women being there at various times, and men, and of the evil reputation of the house,

and of instances of prostitution by inmates, and of lewd conduct by this defendant with Mrs. Denby and another woman, and of his having been "hundreds of times" in the bed-room with the former, and of his having invited there one witness who was there several times, and says the house was one of ill-fame, and that this defendant and Mrs. Denby were the keepers—the people who were running the house. As to this, the witness was hardly cross-examined. This was clearly "some valid evidence" to shew that the defendant was a keeper of a common bawdy house, under sec. 228.

Since October, 1910, the house, though furnished by the defendant, has been vacant, unless when he occasionally stopped there. The presence of one or two women there on three occasions, weeks apart, is shewn, but not the time of day, except once at night, nor the length of their stay. Both of them had been there in Mrs. Denby's time. There is no evidence of any improper conduct or of other men being there. There is not, I think, sufficient proof of the existence of a common bawdy house there during this period.

In his charge to the jury, the learned Chairman, after pointing out that the defendant was the owner of the house, said: "It had been suggested, however, that the woman who had already been convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you." I am at a loss to discover any objection to this, or indeed why the learned Chairman was indulgent enough to reserve any question upon it.

Another question remains as to the right of the Court to try the defendant. The statement of the case sets out these facts: "The prisoner had been committed for trial after the preliminary hearing, and admitted to bail, and appeared, as provided by his recognizances, for trial at the above-named General Sessions of the Peace. The bill of indictment was, however, not preferred by the person bound over to prosecute, but was preferred under directions given by the trial Judge, as provided by sec. 873 of the

Criminal Code. Before arraignment or plea, the prisoner desired to elect trial by the County Court Judge, but it was held that he was not entitled, under the circumstances, so to elect." I assume that the information laid, the preliminary hearing had, and the defendant's recognizance to appear for trial, were all upon the same charge as the indictment.

It is only under sub-secs. 6 and 7 of sec. 825 of the Criminal Code, 1906, as added in 1909 by 8 & 9 Edw. VII. ch. 9, that the defendant, being not in custody but under bail, could have claimed any right to a trial before a Judge without a jury. Previously, he would have had to be in actual custody either upon the original commitment for trial by the magistrate holding the preliminary inquiry, or by virtue of a surrender into custody after bail, or "otherwise in custody awaiting trial on the charge."

The new sub-section (6) provides that a person accused who has been bound over by a Justice under sec. 696 (*i.e.*, to appear for trial), and is at large under bail, may notify the Sheriff that he desires to make his election under Part XVIII. (relating to Speedy Trials), and thereupon the Sheriff shall notify the Judge; and, by sub-sec. 7, the Judge having fixed the time and place for the accused to make his election, the Sheriff shall notify the accused thereof, and the accused shall attend, and the subsequent proceedings shall be as in other cases under Part XVIII.; and, by sub-sec. 8, the recognizance taken when the accused was bound over shall be obligatory with reference to his appearance at the time and place so fixed, and to the trial and proceedings thereupon, as if originally entered into with reference thereto.

No time is specified for the giving of the notice to the Sheriff. If a notice were given in such a case, it would be material to consider at what time an election may be made by those in custody. The original Act providing for trials by a Judge without a jury, 32 & 33 Vict. (1869) ch. 35, was intituled "An Act for the more speedy trial in certain cases of persons charged," etc.—afterwards called the Speedy Trials Act—and this might give some colour to the idea that where the trial would not be speeded the Act was not intended to apply. But, excepting in the title, there

was nothing in the wording of the Act itself so to indicate, except possibly the provisions that the prisoner might with his own consent be tried "out of Sessions," and that the Judge was to tell him that he had the option to "remain untried until the next sittings" of the Court of General Sessions of Oyer and Terminer. These words did not, in fact, I think, imply that the speedy trial must be before the session of the jury Court began—but subsequent amendments removed any possibility of such a construction. It must, I think, be taken that the object of speedy trials indicated by the title was to be attained by the creation of a new tribunal—a Court of record—which would not be limited to half-yearly or other periodical sittings, but could sit at any time, and that tribunal being created (see Ontario statute of 1873, 36 Vict. ch. 8, secs. 357, 358), the positive directions to the Sheriff and the Judge as to their duties towards prisoners, in effect, gave each prisoner to whom the Act applied an option and right of election as to which one of the tribunals he would be tried by, or rather the right to have an opportunity to say he chose trial by the Judge. I do not think it would have been any answer to a claim to exercise such right to say to the prisoner, "The jury Court is now sitting, and your trial there can take place to-day, or sooner than if you are to be tried by the Judge alone." It is now expressly declared in sec. 825 that the trial by the Judge shall be had whether the jury Court or the grand jury thereof is or is not then in session—and I agree with the opinion of Howell, C.J.A., in *Rex v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, that this provision is not restricted to the trial itself.

Then, by sec. 828, even after a prisoner has elected to be tried by a jury, he may notify the Sheriff that he desires to re-elect, and this at any time before his trial has commenced, and whether an indictment has been preferred against him or not—unless the Judge is of opinion that it would not be in the interest of justice to allow a second election; and, if an indictment has been actually preferred, the consent of the prosecuting officer must be obtained.

In cases where, under Part XVI. or XVII., the prisoner had elected before the committing magistrate not to be tried by him,

but by a jury, he may, under sec. 830, notify the Sheriff, before the sitting of the jury Court, that he desires to re-elect.

The Code, therefore, gives three periods for the election by an actual prisoner as of right—before the sitting, before the preferment of the bill, and before the trial has commenced. It would be difficult to say which of these should apply to the case of an accused person who is at large under bail; but I think it is clear that his notification to the Sheriff must be taken as the foundation of his right to put himself in the position of a prisoner as one entitled to be called upon to elect. That he was not in actual custody merely by reason of appearing, “as provided by his recognizance,” is manifest from sec. 1092, which declares that a recognizance is not discharged by arraignment or conviction.

This defendant did not give any such notice, so far as appears; but, at the last moment, when called upon to answer to the indictment, said that he desired to elect. Without being in custody and without having given the notice to the Sheriff, he had not put himself in the position to claim that right. It appears that the Chairman of the Court of General Sessions held “that he was not entitled under the circumstances” so to elect. Therein the Chairman was right, as no notification had been given.

The defendant then pleaded to the indictment, or a plea must have been entered for him, as the trial proceeded, and he was by the jury found “guilty.” There is nothing to indicate that any other result might have been arrived at if the Chairman had been trying the case without a jury, and there is no reason to suppose that there was any failure of justice through the defendant’s omission.

I would answer the first question in the affirmative, the second and third in the negative.

LATCHFORD, J., concurred with the Chief Justice.

Conviction affirmed.

Criminal Code. Before arraignment or plea, the prisoner desired to elect trial by the County Court Judge, but it was held that he was not entitled, under the circumstances, so to elect." I assume that the information laid, the preliminary hearing had, and the defendant's recognizance to appear for trial, were all upon the same charge as the indictment.

It is only under sub-secs. 6 and 7 of sec. 825 of the Criminal Code, 1906, as added in 1909 by 8 & 9 Edw. VII. ch. 9, that the defendant, being not in custody but under bail, could have claimed any right to a trial before a Judge without a jury. Previously, he would have had to be in actual custody either upon the original commitment for trial by the magistrate holding the preliminary inquiry, or by virtue of a surrender into custody after bail, or "otherwise in custody awaiting trial on the charge."

The new sub-section (6) provides that a person accused who has been bound over by a Justice under sec. 696 (*i.e.*, to appear for trial), and is at large under bail, may notify the Sheriff that he desires to make his election under Part XVIII. (relating to Speedy Trials), and thereupon the Sheriff shall notify the Judge; and, by sub-sec. 7, the Judge having fixed the time and place for the accused to make his election, the Sheriff shall notify the accused thereof, and the accused shall attend, and the subsequent proceedings shall be as in other cases under Part XVIII.; and, by sub-sec. 8, the recognizance taken when the accused was bound over shall be obligatory with reference to his appearance at the time and place so fixed, and to the trial and proceedings thereupon, as if originally entered into with reference thereto.

No time is specified for the giving of the notice to the Sheriff. If a notice were given in such a case, it would be material to consider at what time an election may be made by those in custody. The original Act providing for trials by a Judge without a jury, 32 & 33 Vict. (1869) ch. 35, was intituled "An Act for the more speedy trial in certain cases of persons charged," etc.—afterwards called the Speedy Trials Act—and this might give some colour to the idea that where the trial would not be speeded the Act was not intended to apply. But, excepting in the title, there

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alleged and pleads the illegality of the agreement under secs. 496 and 498 of the Criminal Code which are grouped under the general heading of "Offences connected with trade." The trial Judge decided the point of illegality in favour of appellants. On appeal this judgment was reversed.

Having carefully read the cases cited by counsel at the argument and referred to by the Judges below in their notes, I cannot better describe my condition of mind than by quoting from a very recent opinion of an eminent English jurist who said:—

I am convinced it is impossible to give in a few pages a complete and accurate exposition of the English law as to combinations which are in restraint of trade or unduly impede free competition or employment so as to deduce from the numerous and conflicting cases clear and definite principles.

The same authority says that *The Mogul case, Mogul Steamship Co. v. McGregor*, [1892] A.C. 25, 66 L.P. 1, 40 W.R. 337, only decided that an action for conspiracy could not be maintained by the plaintiffs, because the defendants did not by entering into the contract under consideration render themselves guilty of a criminal conspiracy. But on the question whether the contract was void and illegal because it was in undue restraint of trade or unduly impeded free competition, there was the utmost diversity of opinion both among the Judges and the noble and learned Lords. In *Mitchell v. Reynolds*, 1 Sm. L.C. 10th ed., p. 391, the following principles were laid down:—That all contracts in general restraint of trade are illegal in the sense of not being enforceable, but that agreements in partial restraint of trade, if for consideration, are valid, provided that the restraint is reasonable, in the sense that it is such as is reasonably necessary for the protection of the person who seeks to impose restraint (covenantee). In this case, however, we are not called upon to consider in what respect the contract declared upon is affected by the principles of the English law as to restraint of trade, nor are we at liberty to invent or give effect to any new ground of public policy. Our duty is to determine its validity in view of those sections of the Criminal Code relied upon. In effect, clause (d) of sec. 498 of the Code [Cr. Code

of Canada 1906] declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the freedom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. In other words, if the object of the parties to the agreement is to interfere with the free course of trade by unduly preventing or lessening competition the agreement is declared to be unlawful. It is not necessary, I repeat, that the agreement should be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the Courts to say whether in the circumstances of each particular case the mischief aimed at exists. In *The United States v. The Trans-Missouri Freight Association*, 166 U.S.R. 290, it was held that the Sherman Act applies equally to all contracts tending to create a monopoly, whether or not they are reasonable or whether or not they are unlawful at common law.

Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce, and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited. The question for decision here, assuming the law to be as I have stated it, is:—Was the contract declared upon entered into for the purpose of unduly limiting competition in the purchase or sale of an article which is ordinarily a subject of commerce? It is admitted by both parties that junk, the subject-matter of the contract, is ordinarily a subject of commerce. The trial Judge found that the manifest purpose of the agreement

was to prevent competition between the parties to it and to affect prices. He said:—

It cannot be doubted that the tendency of such an agreement would be to lower prices on the junk purchased from the public, and, possibly, to increase the price of junk sold to the consumers.

The learned Judge also said:—

It is true that in the present case the agreement to fix prices was between two dealers only, but these two practically monopolized the whole trade in junk in Western Canada, and when they ceased to compete with each other all competition was gone. The effect of their agreement was not only to limit competition but to destroy it.

And there can be no doubt on the evidence that the conclusion reached by the learned Judge is well founded; the main object and purpose of the agreement was to eliminate competition and to control the junk market in all Central Canada, both as to purchases and sales, and on that ground I hold that the question must be answered in the affirmative and that the agreement is, therefore, bad under the sections of the Code. I can see no distinction in principle between this agreement and one that might be entered into between two or more traders to control the price of all wheat purchased and sold in Western Canada, and if the object was to monopolize the wheat trade of Western Canada instead of, as in this case, the junk trade, would any Court hesitate to declare it illegal in that it was calculated to unduly impede free competition to interfere with the free course of trade, and to effect a wrongful purpose?

I would allow the appeal and restore the judgment of the trial Judge with costs.

DAVIES, J. (dissenting):—This is an appeal from the judgment of the Appeal Court of Manitoba reversing a judgment of the trial Judge which declared an agreement made between the parties on which the plaintiff had brought an action to be void as contravening sec. 498, sub-sec. (d), of the Criminal Code.

The agreement in question was made between two junk and bottle dealers who purchased these articles amongst others in Winnipeg and elsewhere in Western Canada, and shipped them for sale to Chicago in the U. S. A.

It was dated the 28th March, 1905, and was to continue from the first of April till the 15th December following, with a provision for an extension thereafter from month to month if mutually agreed upon, and as a fact it was renewed up to the 1st January, 1907. It professed to fix the maximum prices which each of the parties should pay for the several articles specified in the schedule, which prices were to be subject to revision by mutual consent, and provided that each party should make up accounts monthly shewing the profit or loss made on the business done and that the profits should be equally divided.

The trial Judge held that "the manifest purpose of the agreement was to prevent competition between the parties to it and to maintain a fixed price for junk purchased."

He further held, however, on the facts as proved and after reviewing a number of authorities that "the agreement in question went no further than that in *Collins v. Locke*, 4 A.C., p. 674; that the provision for carrying it into effect, viz., the monthly division of net profits was not unreasonable and that the restraints imposed were nothing like as great as those in the case cited. He, therefore, held the agreement not to be void at common law as being in restraint of trade.

But, while upholding the agreement at common law he nevertheless held it was void as being in contravention of sec. 498, subsec. (d) of the Criminal Code.

The Appeal Court of Manitoba, Richards, J., dissenting, reversed the judgment and held the agreement was not void, either at common law or as contravening the Code. Richards, J., the dissenting Judge, in the Court of Appeal says nothing about the validity of the agreement at common law but follows the trial Judge in holding that it contravened the statute.

Chief Justice Howell held that outside of the criminal law the agreement was binding and that the intention of Parliament in passing the criminal statute was to "suppress certain contracts and combinations in restraint of trade and make the parties thereto liable to an indictable offence, and that the agreement did not contravene the statute." Cameron, J., agreed with him

on both grounds, while Perdue, J., agreeing on the first ground that at common law the agreement was not bad, held that it did not violate the statute because it did not "unduly prevent or lessen competition" in the articles it covered.

With respect to the agreement here in question I agree with the trial Judge and the three Judges of the Appeal Court that applying the rule now followed by the Courts in determining the validity or otherwise of agreements or covenants claimed to be in violation of the common law it cannot be held void. That rule, as I gather it from the authorities, is that every case must be decided on its own facts and that the controlling and guiding rule in each case is whether the restraint attempted is reasonable or not with respect to the interests of the parties concerned and to the public interests.

The case of *Nordenfelt v. The Maxim Nordenfelt Co.*, [1894] A.C., p. 535, decided by the House of Lords, determines that a covenant against the convenanter engaging in a particular business though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers, wider than was necessary for the protection of the company nor injurious to the public interests of the country and, therefore, was valid. The speeches of the distinguished law Lords who took part in that decision without any dissenting voice united in the test of reasonableness, as being the guiding and controlling test in all cases, and whether the covenant or agreement is general or particular. In determining the question of reasonableness they further held that the Courts should have regard as well to the interests of the public as of the parties to the agreement and that each case must be decided on its own facts and by the application to them of this general test. The later cases of *Dubowski v. Goldstein*, [1896] 1 Q.B. 478, and *Underwood v. Barker*, [1899] 1 Ch. 300, are to the same effect on similar reasoning. In the latter case Lindley, M.R., says, at pages 303-4:—

The law as now settled cannot, in my opinion, be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt v. Maxim*

Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, at p. 565. He said: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad.

On page 305 he says further:—

As was pointed out by Lord Macnaghten in *Nordenfelt's* case what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction which is *reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established*. If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.

Applying what I conceive to be the modern rule with respect to the validity or invalidity of agreements or covenants in restraint of trade, I have no difficulty in agreeing on the facts of this case with the finding of the trial Judge confirmed by the Court of Appeal that the agreement in controversy from his obligations under which the defendant, appellant, seeks to escape, is a valid agreement at common law.

The question then remains whether this agreement at common law has been invalidated by the statute. I have reached the same conclusion as that come to by the Court of Appeal, that it does not violate the statute. I do not read the word "unduly" which prefaces and controls sub-sections (a), (c) and (d) of sec. 498 of the Criminal Code as having any greater or wider meaning than "unreasonably" which is the common law test, and if that word had been used in the statute the finding of the validity of the agreement at common law would, of course, settle the question. I have heard nothing during the argument, and the consideration given to the case since then has not suggested anything which satisfies me that the word "unduly" was intended to have any broader meaning than "unreasonably." That some limitation was intended by the word is, of course, conceded. If it does not mean unreasonably I do not know what it does mean. I prefer the word "unreasonably" to any of the others suggested, such as "improperly," "excessively," "inordinately," because I think it satisfies the intention of Parliament better than any of the others.

Section 498 of the Criminal Code was first enacted in 1889 in a statute intituled "An Act for the prevention and suppression of combinations formed in restraint of trade," which had for its preamble the following: "Whereas it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade." Parliament did not pretend to enact something new as part of the criminal law. It was not creating or defining a new offence before unknown to the law. It was simply, as said in the preamble, "declaring" and formulating what I venture to think the existing law then was, namely, that a conspiracy unlawfully (a) to unduly limit facilities for transportation, etc., or (b) to restrain or injure trade or commerce, or (c) to unduly prevent or lessen production, etc., or (d) to unduly prevent or lessen competition in any article which was a subject of trade or commerce constituted a misdemeanour. Punishments by way of fine and imprisonment were added, of course, as sanctions of the declared law.

The drafting of the new statute was, no doubt, faulty. The use of the two words "unlawfully" and "unduly" was necessary but that it was a declaratory law only and only intended as such I do not doubt.

The Criminal Code of 1892 re-enacted this statute in its 520th section, retaining both words "unlawfully" and "unduly," and enacted section 516 declaring what a conspiracy in restraint of trade was. That also was declaratory only of the existing law. In 1899 the section was amended by striking out the word "unduly" in paragraphs (a), (c), and (d). In 1900 the word "unduly" was restored in each of the three paragraphs, (a), (c), and (d), while the word "unlawfully" was struck out of the main section so that it read every one was guilty of an indictable offence, etc., who conspired, etc., with others to "unduly" limit, etc. In this latter form it remains at present.

I think the amendment striking out the word "unlawfully" was a desirable one, and that in view of the enactment of the present sec. 486 in the Code of 1892, the retention of the word "unlawfully" was unnecessary. The history of this legislation, however, throws little light upon its proper interpretation but it confirms me in my opinion that Parliament was not so much creating a new criminal offence as it was defining an existing though unwritten one and attaching to it punishments by fine and imprisonment.

If that is so and the misdemeanour defined by the statute is nothing more than a conspiracy to carry out contracts or agreements which by the common law were illegal as being in restraint of trade, the finding that this contract in controversy was not in restraint of trade would also determine that it was not a violation of the statute.

I agree with Chief Justice Howell and Cameron, J., that this is the real solution of the difficulties arising from construing art. 498 of the Code as creating a new offence instead of as declaring and defining an existing one. I also agree with them

and Perdue, J., that the word "unduly" as used in the section should not be given a greater or wider meaning than the word "unreasonably," and that if so confined the suggested construction as one declaratory only is confirmed.

Holding, therefore, that the contract in question is not void at common law as being unreasonably in restraint of trade, I hold it is not within the declaratory law, sub-sec. (d) of sec. 498 of the Code, which is directed against conspiracies to unduly or unreasonably prevent or lessen competition in the purchase or sale, etc., of any article, etc., a subject of trade or commerce.

I would dismiss the appeal.

INDINGTON, J.:—By virtue of long experience in the business each had separately carried on in Winnipeg, these parties determined to control, by fixing the prices to be paid for the commodities dealt in, the entire purchases thereof between Lake Superior and the Rockies. They adopted, not as a partnership though resembling it, a device or plan of sharing the profits derivable from the dealings each might have in specified leading articles of said commodities for which the maximum prices to be paid were to be fixed by them jointly from time to time. These prices, or the lower prices actually paid, were to be the profit sharing basis, and thus either transgressing by paying a higher price would be automatically penalized therefor.

There was neither joint capital nor mutual contribution of capital in any venture, nor joint action, in use of capital either used, or in the management of the business. Each carried on his own business free from interference of the other. At the end of the year an accounting was to be had of the profit or loss each had made on the basis of the maximum prices so fixed or such less prices as each might have paid. The only recital in the agreement expresses a desire "of entering into an agreement to facilitate the dealing in various articles hereinafter mentioned, without in any way interfering with the freedom of trade and commerce." In what way and how was this to facilitate dealing? When regard is had to the language used and what was

actually done this much is clear: first, that merely partnership profits was not the purpose of the agreement, and next, that the parties had a consciousness of how perilously near they might be to infringing the statute.

They operated and accounted to each other on the basis of this agreement for a year, and then by letters renewed it, but fell out later, chiefly because the appellant did not conform to the purpose of the agreement. He had so far departed from the paths of rectitude as to buy from another Winnipeg dealer who had come into and ventured to operate in the chosen field of these parties. The mind of respondent never contemplated that kind of "facilitating the dealing in various commodities." It was clearly repugnant to the common purpose and a breach of faith. The recital must have been a mistaken or defective description of the common purpose. After repudiating this vile deed done by his brother-in-arms, he sued him for an account. The latter set up sec. 498 of the Criminal Code as a bar to this alleged right of recovery.

The defendant (now appellant) swears the purpose of the agreement was to control the market for themselves within said limits, to cease competition with each other, to get as large a profit by keeping out competition as they could; and he says they succeeded.

The learned trial Judge finds this story the true one, though contradicted by the plaintiff (now respondent). He says further "the effect of their agreement was not only to limit competition but to destroy it." The objection to such extrinsic evidence, which is always admitted to prove illegality, cannot prevail.

I agree with the learned Judge's findings of fact relative to the issue. I do so the more readily as the respondent's letters and admitted conduct confirm or at least harmonize with the appellant's oath and contradict the respondent's.

The section 498 in question reads, as it stood amended at the time in question herein, as follows:—

... an indictable offence . . . who conspires,
 . . . with any other person . . . (d) to
 . . . competition in the production, manufacture,
 . . . transportation or supply of any such article or

article or commodity" is defined in sub-sec. (a)
 . . . which may be subject of trade and commerce."

... scope and purpose of this legislation and the opera-
 . . . be assigned in it, are difficult of accurate compre-
 . . . definition.

... however, with great respect, quite clear that the major-
 . . . Court appealed from have misapprehended it.

I understand them aright, the measure of the word "un-
 . . . to be found in a long line of authorities where con-
 . . . in restraint of trade had been held to be against public
 policy. If the purpose of Parliament had been merely to make
 . . . to such contracts as these authorities relate to amenable
 to the criminal law, the expression thereof would have been
 easy, and I apprehend quite different in terms from those used
 either in the recital or operative parts of 52 Vict. ch. 41, which
 first enacted the law in question.

That Act recited "whereas it is expedient to declare the law
 relating to conspiracies and combinations formed in restraint of
 trade and to provide penalties for the violation of the same."

And in the forefront, as it were, of the offences to be dealt
 with, we find (a) the limiting of facilities for transportation;
 next, (b) the restraining of commerce; (c) the limiting of pro-
 duction, or unreasonably enhancing the price of that produced;
 and lastly, (d) which is in substance quoted above.

The whole scope of this legislation is clearly something be-
 yond the narrow limits upon which the reasoning in support of
 the judgment appealed from seems to proceed. It cannot be said
 to be a purely declaratory Act. It covers ground not covered
 by the then existing law. In no sense can the field it covers be
 held to be co-extensive with the field of law relative to restraint
 of trade wherein these authorities had operated.

The *Maxim-Nordenfelt case*, *Nordenfeldt v. Maxim-Norden-*

feldt, [1894] A.C. 535, relied on to shew earlier cases overruled, or law relaxed, had not even been heard when this statute was enacted.

Not only that, but who that has had to struggle with the innumerable contracts and distinctions between contracts, alleged to be in some way in restraint of trade, ever dreamed of the law on the subject being made merely clearer by making it the subject of criminal legislation? Yet the offence against public policy involved in the said cases had been recognized, however ill-defined, for nigh three centuries and never seems to have been directly rested on criminal law; nor yet as a supposed violation of morals. Public policy alone, it was said, required certain limits of time and space to be observed in such contracts and these limits were measured by the good old word "reasonable," so often found in every phase of our English law. Why should Parliament discard it and adopt another less in use, less easy of comprehension, if merely declaring and clarifying the law as applied in civil cases relative to restraint of trade?

Not only had the expansion of trade and commerce in England by the year 1889 rendered the lines laid down in many old cases somewhat unfitted to follow under new conditions then existing in England, but their applicability to Canada and its conditions seemed still more grotesque as a foundation and defined field of operation for a criminal statute such as we have to interpret and construe.

But it may be asked, why should it proceed by prefacing the whole with the word "unlawfully"? And further asked was it not merely the purpose to fix penalties for doing that which was already unlawful? Is it not clear that the draftsman erred in using both words "unlawfully" and "unduly" in the connection in which they were placed? Surely if a thing were unlawful it must be undue. It was never intended to declare that an undue measure of unlawfulness was the thing to become indictable.

Parliament set out as the recital shews, to declare what was to be held unlawful and evidently intended to declare that the un-

duly doing that which was referred to in sub-sec. (d), amongst others, were unlawful things and must be prohibited.

And to make this clear the Act was in 1899, inadvertently, as I think, amended by striking out the word "unduly" and thus leaving "unlawfully" the test. Next session, on attention being drawn to the inadvertence, the word "unlawfully" was stricken out and the word "unduly" restored. The Act as thus finally amended is what is pleaded here. This legislative history demonstrates as clearly as possible that it was not as against something already unlawful, but the unduly doing that then lawful so far as the criminal law extended that the amended statute was aimed at.

And with all this effort to express its meaning, we are asked to say it was not "unduly" that Parliament intended to use, but another word so commonly in use in relation to part of the very subject in hand.

It seems to me that so far from designing a law that must have for its limits of operation the field covered by such authorities, it was the settled purpose to avoid that being done. That was something which did not fit the subject in hand.

However, we are not debarred from looking at the legal history of either unreasonable restraint of trade as interpreted by the Courts or anything else within the common knowledge of mankind which, in order to effectuate the purpose of the legislature, may help us to find out, if we can, what meaning we must attach to the word "unduly" in sub-sec. (d) of sec. 498 of the Code as it stood in 1905 and 1906.

The contracts usually designated as in restraint of trade at common law may be so far as falling within the descriptive language of the statute, *primâ facie*, within the field of that which is prohibited by this statute. I can, however, imagine instances of such restraint which may arise and yet not have been unduly made within the Act. And for reasons I am about to advert to in connection with the *Mogul* case, *Mogul Steamship Co. v. McGregor*, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, its operative range as a

criminal statute affecting and invalidating contracts must exceed the narrow limits of the old doctrine referred to. It is now for the first time before this Court. So far as I can see each of the other cases cited to us, in which different Courts have dealt with its application, presented a mass of facts shewing the conduct of those charged with having infringed it, to have been more or less repugnant to the minds of all right-thinking men, and hence the duty to apply it apparently clear.

The magnitude of the aggregate business involved, the far reaching evil consequences likely to flow from upholding as legal the respective schemes attacked in these cases, and the chances that if upheld their peculiar features so obnoxious to the welfare of the community, would be so greatly extended as to become disastrous, all aided the Courts to apply the Act.

Whether, if such schemes were allowed to run their own course entirely unfettered and unfostered by legislation, the result would be so dreadful as frightened people imagine, one may be permitted to doubt.

If one considers the long history of the abortive attempts exemplified in the long lists of Acts repealed by 22 Geo. III. ch. 71, and 7 and 8 Viet., ch. 24, this doubt will hardly disappear. As we have nothing, however, to do with the wisdom or unwisdom of the legislation, such considerations are only of value here in aiding us by a survey of the whole field of its possible operation to try by drawing lessons from past failures to give it such effect as will not operate detrimentally upon any person or class of persons, not desiring to improperly defeat competition; and, above all, that it may not become itself, by virtue of our decision, an undesirable restraint upon the freedom of men in their business dealings, and thus another hindrance to competition.

This being a criminal statute we must try to find the vicious purpose aimed at in order to bring parties within its prohibitions. What then are to be the distinguishing features that may, in any given case, and must in this case enable us to determine

falls within any of the prohibitions of the statute, that we must examine it in its general bearing upon the public interest, and we can its whole possible field of operation. The question which must appear in any given case is that the arrangement is one designed to prevent or lessen competition. It must be also an attempt at what would be an injury, if not prevented, by the doing thereof, that is agreed upon. It needs neither actual operation nor aught but an agreement to try to be successful, would be the unduly preventing or lessening of competition.

Crimes usually imply something all right-minded men condemn. This one may or may not necessarily be so offensive. For example, the contracts of hiring, of leasing, of partnership and incorporation, may in some ways involve an actual, and within some of said cases, unreasonable lessening of competition, and hence be conceivably formed outside the offence created by this statute, or fall well within it. It may be that all of these contracts, or indeed many others *primâ facie* legitimate, and possessing no inherent evil, may involve changes disturbing and possibly lessening competition, yet each and all be so used as to produce a great injury to society. It is this feature of the problem which this Act attacks that requires in the limitation and definition of the offence some qualification such as the word "unduly" has been chosen to serve. The test must in each case be the true purpose and its relation to the activities specified in and by the words of the statute, and a finding of an evil or vice answering to the descriptive word "unduly."

It may be asked how can prevention or lessening of competition or attempt thereof be an evil when the fact confronts us that the whole business fabric of Canada is founded upon restraint of competition? It may be said that in face of such fact it is impossible to assign an evil motive or vicious purpose of any kind in merely contracting to prevent or lessen competition.

It may well be, indeed, that the one is the logical sequence of the other by force of the development thereof, or the activities induced thereby, yet be unjustifiable for those enjoying the

benefits of these restrictions to abuse the power thereby given them.

We must, moreover, recognize that there are many statutes for beneficent purposes yet productive of evils which call for amendments to the law to meet the evil by-product thereof, whilst retaining for some wise purpose, the parent statute, as it were.

Corporate creations are necessary for the promoting of manufacturing and commercial life. Yet the facilities and capacities given them also tend in many ways to produce and do produce much of the evil I conceive to be aimed at by the statute.

Patent laws may be righteous protectors of the inventor or discoverer and beneficent stimulatives, yet may be made undesirable weapons of offence.

It seems to those whose race and country have had such implicit belief in the sanctity of contract, untainted by immorality or illegality, difficult to justify on ethical grounds the invasion of any field covered thereby.

It is important, therefore, to make clear from the observation of the operation of possible causes and the experience relative thereto and in other regards, how such a vicious purpose as implied in violating this Act may spring from being tainted with a desire to do that which may not of necessity and under all circumstances be held in itself vicious.

The development of modern industrial and commercial life, however, has certainly, when some of the later results are looked at, justified men in re-examining the profound belief heretofore held in unfettered contract and such competition as may exist therewith. And when they produce as the result of such examination a statute like this and throw upon the Courts the duty of drawing the line at the right place we must, in order to discriminate properly, examine all such and similar suggestions as the several foregoing, and all else within the whole range of legislation bearing on the problem so far as we can and determine the principles upon which to proceed.

The state assuredly has the right to withdraw its aid from him who plots with another to deprive his fellow-men of the

reasonable expectations each of them is entitled to cherish if the ordinary results of competition are allowed that free scope upon which so much of the prosperity and happiness of the dwellers in a free country hang.

It is at this point the onus of the whole question lies. We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the ordinary results of competition to which I have just referred, and hence a new statutory crime had to be created.

The necessity for finding in this new crime the vicious or evil purpose inherent in the agreement of the parties to it, renders it necessary to determine in each case as it arises where the ordinary rights of the public to enjoy their reasonable expectation of due and fair competition (which are yet possible within the limits left when legitimate effect has been given or allowed for the restrictive legislation I have referred to) are at an end and the absolute right of contract begins. We need not traverse here the whole field but use, as illustrative, a part of the evil existent under the old law, and the operation thereon of the new, and observe the wide distinction between the operation of the doctrine of public policy relative to restraint of trade, and the effective range of this new law.

The law as it stood in England coeval with the first passing of this Act, and till then existent as our law also, was laid down by the highest authority, relative to the right of competition as follows, in the case of *The Mogul Steamship Co. v. McGregor, Gow and Co.*, [1892] A.C. 25, at p. 37, 66 L.T. 1, 40 W.R. 337, Lord Halsbury said:—

I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present

argument at the Bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law Courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'

And in the same case Lord Morris said, page 49, as follows:—

The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons.

It is to be observed that this was said in a case where the "conference" or league of shippers seemed by reason of its being against public policy to be admittedly not binding between the parties. In that case it seems to have been also made clear that those entering into such contracts committed no offence for which an indictment would lie.

We know, as part of common knowledge, that the most effective weapon such combinations have used on a gigantic scale to crush out competition in the United States, for example, has been that which was adopted by the defendants in that case.

If this statute is not aimed at such combinations here, what can it have been aimed at?

There are a great many subsidiary methods commonly in use to promote the ends such combinations are directed to. Amongst those are the purchases or leases of factories to hold them in idleness; the combinations to fix prices, and to refuse to deal with anyone who will neither accede thereto nor join the association, nor submit to undertaking for an observance of their rules; the restrictive contracts in sales; and the rebates given, or shifting rates of profit conditioned upon the observance of the terms imposed relative to resales, and thus and thereby covering the fixed or variable prices, and the lists of parties or classes of people not to be dealt with, or alone to be dealt with.

Often these devices are aided by the use or abuse of the patent laws which are made to lend a strength to the operation of these compacts dictated by the combinations; and the use or abuse of the incorporating laws are made to bear the like fruit.

remove competition by such like devices
the ruin of many by the temporary low-
ing of, prices, and though some of the
a time the benefit of such proceedings it
payment by the public of much higher prices
competition at a fair continuous normal rate of
ave to be paid and generally as much higher as
be extracted from the public regardless of any
of price by way of what a fair profit requires. In
it means, if successful, the reaping of enormous
by the few, to the detriment of the many.

right in this country to drive others out of trade by
means and for such selfish purposes, so plainly recognized
the quotation above, as legitimate in England and formerly
is taken away by this statute. The statement of this legal
right was not intended by their Lordships to countenance the use
of any but legal means.

Rowen, L.J., in joining in the judgment from which the
above appeal to the House of Lords was taken, says in *Mogul
Steamship Co. v. McGregor*, 23 Q.B.D. 598, at page 614, as fol-
lows:—

No man, whether trader or not, can, however, justify damaging
another in his commercial business by fraud or misrepresentation.
Intimidation, obstruction, and molestation are forbidden; so is the
intentional procurement of a violation of individual rights, contractual
or other, assuming always that there is no just cause for it.

It is quite clear, however, that the covert use of all these
means which the late Bowen, L.J., refers to are likely to be faci-
litated if not encouraged by a recognition of freedom to resort to
the schemes this state of law in England permits. This statute is
intended to prohibit not only the use of all such schemes but also
all else conceivably productive of the like results as such means
might produce, whether allied together with such schemes or
not.

The doctrine of *Allen v. Flood*, [1898] A.C. 1, 77 L.T. 717, 46
W.R. 258, might also help in conceivable circumstances to lend

an appearance of legality to that which would thwart the operation of this Act and in such cases may have to be discarded.

The almost exultant tone of exposition several of the judgments in the *Mogul* case, *Mogul Steamship Co. v. McGregor*, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, adopt in maintaining the law as laid down above may be well warranted in a country enjoying free trade. But we have chosen an entirely different commercial system and must have regard thereto. We must act in harmony therewith. We must assume that an Act such as this is not placed on the statute book for an idle purpose. Its operation must not be minimized simply because of difficulties in the way of enforcing it. Its purpose is to crush out of existence an evil. Its success, if any, must depend on its administration. Its great risk of failure lies in the fact that the requisite knowledge of the social and commercial forces shaping the social structure does not lie in the daily path of the lawyer's life, and that it cannot be well supplied by expert evidence.

I desire to guard against the impression that each of many of the devices I have referred to by way of illustration, and others of a like kind that do exist, must necessarily be obnoxious to the Act. It is the purpose to which they may be put that is the test. If that purpose be to bring about what the Act is designed to frustrate, it is vicious. My endeavour herein is to point the attitude to be taken and the path or way to ascertain and identify in the concrete an evil which is incapable of concise and accurate definition.

The application of tests by which to ascertain the possible evil results the Act seeks to avert may be much facilitated by a study in that regard of the jurisprudence of the United States with a commercial system and an historical development similar to but older than our own.

The enhancing or lowering of prices, the variation thereof without obvious causes other than the evil purpose the Act forbids, the margin of profit, the scale of business, the operative field, the frame of the contract, the devices used therein and in its execution, the refusal to deal with others without assigning

any reasonable cause, which is so inconsistent with the ordinary motives of men presumed to be governed by a due observance of the act; the entire conduct of the parties, and the results produced, must each and all furnish some aid to determine whether or not the Act has been intended to be violated.

On the other hand, every step taken in the past to enlarge the bounds of human freedom of thought and action has stimulated discovery and invention, and as a product thereof increased competition, which may have left by the way here and there financial wrecks as the result thereof. This has made men cry aloud in denunciation of the waste of human energy and loss of human comfort resulting from competition. The cry is often a thoughtless one. People raising it seldom reckon with the absolutely necessary waste there is and must ever be incidental to growth, though all nature attests it on every hand. Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived. All these considerations must always be kept in view and not be lightly set aside or the results involved therein be confounded with the actual products of violation of the Act and used as absolute, or necessarily any, proof of a vicious purpose.

For example, though rate of profit may be some guide the use of any standard of profit itself apart from the comparison of changes of one time or set of conditions with another must, as evidence, be of trifling value.

To apply the standard of profit that might enable the stupid, the slothful, the ignorant, the over-capitalized man working with antiquated machinery and a mill or warehouse overmanned, to compete with the standard that may be fairly reached by the men of brains, of energy, of sleepless vigilance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish, would be a sorry one indeed for society.

The fate of the former class must not be considered. But the

latter must not resort to unfair devices. They do not need them. They are without them the best kind of commercial asset the world can have, and must never be depressed or suppressed by this law.

They may indeed need to be protected, and it ought to be the anxious care of society and its Courts of justice to see that they get protected against the combinations of the men of the other class who ultimately must go to the wall before their onward march if they be given a fair chance.

In thus illustrating the law as it was, the evil to be remedied, the principles to be observed in applying the remedy and the difficulties to be met in doing so, I by no means pretend to have covered the whole ground, but enough to enable those concerned in this case to apprehend the law.

I desire to add a few words here to what I said at the outset on the question of the widely different fields covered by the doctrine of public policy relative to restraint of trade and this criminal statute.

This Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose, and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void.

A world-wide difference exists and may by grasping this principle of law be appreciated here between the consequence flowing from the application of the public policy principle and that of this statute.

It is quite conceivable that in many ways people might have entered into contractual relations of a subsidiary or collateral character with any of the parties to the combination in question in the *Mogul* case subserving the purposes thereof and be bound by and able to enforce such collateral or subsidiary contracts,

even if the existence and purpose of the combination were known to the people so contracting.

I can find no authority which has ever reached so far as to hold contracts having such an indirect relation to the restraint of trade being held void or tainted thereby with illegality.

Indeed, within the principle that "when the immediate object of an agreement is unlawful the agreement is void (see Pollock on Contracts, 8th ed., p. 386), it is difficult to see how collateral or subsidiary contracts, for example, designed to facilitate the execution of a plan (of which the execution is legal) once agreed upon could be held void. The compact itself in restraint of trade was void, but the execution of the purpose thereof was held to be legal though involving the destruction of competition. The subsidiary contracts forming no part of the originating compact, but merely legally aiding that legal execution of it, could hardly be held void.

On the other hand, every kind of contractual relation attempted to be made with anyone of the parties to a combination obnoxious to this statute and to the knowledge of the party so contracting and subserving the purposes of the combination in doing that which violates the Act would be clearly void if for no other reason than constituting an aiding or abetting a violation of the criminal law or as part of a conspiracy to defeat the criminal law.

This exact distinction I draw between the operation of the doctrine of public policy and this Act was not taken in argument, and though I am profoundly convinced of its validity and importance, I am not to be taken as carrying in absence of argument or necessity of doing so, the suggestion as to the validity of contracts subsidiary or collateral to a scheme formed in restraint of trade as violating public policy too far or indeed further than mere illustration and suggestion.

The doctrine of restraint of trade violating public policy is not abolished by this Act which I conceive not to be a substitution therefor. And as suggested by many learned Judges the interests of the public means something possibly not yet passed

upon in all its shades. Nor am I to be taken as suggesting that the illustration, the *Mogul* case, *Mogul Steamship Co. v. McGregor*, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, furnishes, covers all this Act is applicable to, far from it.

In this case I do not see such difficulties as I have adverted to as possible and as I anticipate must arise in many others. In addition to the vicious purpose to be sought in such cases which I think is only too apparent herein we have the extent of field over which it was intended to reign, and did reign in its execution. It would have presented much greater difficulty had respondent's thorough-going contempt for the thought of doing anything like a "malimid" (Hebrew for school teacher) or indeed in any way regarding the welfare of others not been made so apparent.

His one thought was if possible to destroy all competition and, if need be, those who ventured to come in competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult, if not impossible, for others to become rivals, and stop competition in the same field of business.

These parties succeeded so far that their profits were nearly doubled. They seem to have been reasonably successful previously to this and thus had no excuse for their conduct. Their purpose was so clearly obnoxious to the Act it would matter not even if increased profits had not been reaped. The legal result ought to be the same.

It is because of the novelty of the case and the need that there should be no misapprehension arising from its results and that honest men may not be entrapped from reliance on the former state of law here and in England, which I have adverted to, and still existent in England, which seems in harmony with the commercial ethics of most men, that I have dealt at such length with it.

It is to be observed that the individual seems still free to do as was permitted to the combination in the *Mogul* case. The corporation possibly may also, but there a nice puzzle may be

presented some day which I will not venture to anticipate. It may itself be founded on a scheme to violate the Act.

The appeal should be allowed with costs here and in the Court below, and the trial judgment be restored.

DUFF, J.:—The learned trial Judge has in effect found that it was one of the direct and governing aims of the parties to the agreement in question to restrict and if possible suppress competition in the buying and selling of the articles specified in the Provinces of Manitoba, Saskatchewan and Alberta, with the object of establishing and maintaining a monopoly of the distributing trade in those articles. I think the evidence supports that view. At least, one of the articles—scrap iron—is shewn to have been a commodity of considerable commercial importance. I think that in entering into such an agreement the parties to it were guilty of an offence under section 498 (d) of the Criminal Code.

I agree with the Court of Appeal, that looked at from the point of view of the parties alone the provision of the agreement for fixing the prices at which the commodities in question were to be bought would be a provision reasonably necessary for the protection of the interests of persons who should agree to share profits and losses in the purchase and sale of such commodities. But that circumstance, in my judgment, is not decisive of the question upon which we have to pass in this appeal.

The view upon which the judgment of the Court of Appeal is based, as I understand it, is that the question at issue must be decided by ascertaining whether at common law the Courts would have refused to enforce this agreement as being an agreement in restraint of trade; and that the answer to this question must in turn be governed by the opinion of the Court upon the point whether or not the term of the agreement providing for the fixing of prices was reasonably necessary for the protection of the interests of the parties under their contract to share profits and losses. That view, I think with respect, is based upon an

inadequate conception of the principle of the common law as well as of the theory underlying the enactment we have to apply.

An opinion which has often found expression in text-books and sometimes in the judgments of very distinguished Judges is that the common law considers freedom of contract of such paramount importance that given a principal lawful contract not in itself effecting any restraint of trade (a partnership, a contract for the sale of a business, a contract of employment) subsidiary agreements restraining trade or competition are entitled to the aid and protection of the law if only such subsidiary agreements are reasonably necessary for the protection of the individual interests of one of the parties in the principal transaction.

But it is impossible now to affirm that such is the rule of the common law. In *Maxim v. Nordengelt*, [1893] 1 Ch. 630, at p. 649, Lindley, L.J., said:—

In *Roussillon v. Roussillon*, 14 Ch. D. 351, 42 L.T. 679, 49 L.J. Ch. 338, 28 W.R. 623, Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord James in *Leather Cloth Company v. Lonsont*, 39 L.J. Ch. 86, L.R. 9 Eq. 345, 21 L.T. 661, 18 W.R. 572, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed, as quite correct. *The doctrine ignores the law which forbids monopolies.*

In the same case Bowen, L.J., said, at page 667:—

For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; and a rule

founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use—a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.

The judgment of A. L. Smith, L.J., at pages 672 and 673, makes it clear that that learned Judge accepted the view that an agreement in restraint of trade would not be enforced if it was clearly one prejudicial to the interests of the public however unexceptionable it might be from the point of view of the parties.

In the House of Lords, *Nordenfeldt v. Maxim-Nordenfeldt Co.*, [1894] A.C. 535, Lord Herschell says at page 549:—

I must, however, guard myself against being supposed to lay down that if this can be shewn (that is to say, if it can be shewn to be reasonable from the point of view of the parties' interests) the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might, nevertheless, be held void on the ground that it was injurious to the public interest.

Lord Ashbourne, at page 559:—

I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

Lord Morris, at page 575:—

These considerations (i.e., the governing considerations in determining the validity of an agreement in restraint of trade) I consider, are whether the restraint is reasonable and is not against the public interest.

And finally, Lord Macnaghten at page 565 states the law thus:—

The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—

reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

It is quite clear that all of these eminent Judges had in view the possibility of a state of circumstances arising in which the public interest in restraining encroachments upon freedom of competition might have to be maintained at some sacrifice of the public interest in freedom of contract even in such common commercial transactions as the sale of a business.

It was because no doubt in the opinion of the legislature the conditions had actually come into existence which Lord Bowen foresaw as a possibility merely, that this legislation was enacted. The particular sub-section with which we are concerned was plainly intended to protect the specific public interest in free competition. In applying the section the public interest in freedom of contract in commercial matters, and especially in freedom of disposition by the individual of his own labour and skill and in freedom of dealing in private property, must, of course, be kept scrupulously in view, otherwise there might conceivably be some risk of ultimately defeating the objects of the enactment by depriving the legitimate commercial energies of the country of some of their important incentives. But giving full effect to these considerations, I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

ANGLIN, J.:—The plaintiff sues for an accounting of profits made by the defendants in their junk business, to a share of which he claims to be entitled under the terms of an agreement between them. The defendants, who pleaded as a defence

the illegality of this agreement on the grounds that it was designed to effect a restraint of trade unlawful at common law and that it contravened clause (d) of sec. 498 of the Criminal Code, in that it was an agreement to unduly prevent or lessen competition in the purchase and sale of articles which were a subject of trade or commerce, appeal from the judgment of the Court of Appeal for Manitoba reversing the judgment of Mathers, C.J., who had held that the agreement, although not illegal at common law, was in contravention of clause (d) of sec. 498 of the Code.

If the determination of this appeal depended solely upon an appreciation of the evidence contained in the record, I should be disposed not to entertain it, notwithstanding the dissent of Richards, J.A., from the judgment of the appellate Court. As I understand the matter, however, it is upon the meaning to be attributed to the word "unduly" in sec. 498 of the Code that the Court of Appeal differed from the learned trial Judge, and it is the appellate Judges' interpretation of that important statutory provision which the defendants ask us to review.

I agree with the decision in *The King v. Elliott*, 9 Can. Crim. Cas. 505, that it does not follow that, because an agreement of which the alleged purpose is "to unduly prevent or lessen competition in the . . . purchase . . . or sale" of some "article or commodity which may be a subject of trade or commerce" is not unlawful at common law, it may not constitute an offence against clause (d) of sec. 498 of the Code. As pointed out in that case, Parliament in striking out the word "unlawfully," with which the introductory paragraph of sec. 520 (now sec. 498) originally concluded (55 and 56 Vict., ch. 29), should be credited with an intention to effect some real change in the law. I cannot think that this word was struck out merely because it was thought that, upon a proper construction, the agreements dealt with in sec. 498 would be held to be only such agreements as are declared by sec. 496 to be conspiracies in restraint of trade. As originally enacted in the Code of 1892, sec. 520 (498), contained both the words "unlawfully" and "unduly." To constitute an offence under it the parties must have unlawfully

agreed "to unduly limit facilities for transporting, etc., to unduly prevent, limit, or lessen manufacture, etc., or to unduly prevent or lessen competition in production, manufacture, purchase, barter, sale, transportation, etc." The history of sec. 498, I think, precludes the view that in amending it, Parliament merely wished to remove a tautologous word. "Unduly" was first struck out (62-3 Vict., ch. 46), "unlawfully" being left in; but in the following year (63-4 Vict., ch. 46) "unlawfully" was struck out and "unduly" was restored. As the Code was originally drawn, sec. 516 (now sec. 496) did not govern sec. 520. The latter section was complete in itself. Since it contained the word "unlawfully" there could be no occasion to import that restriction from sec. 516. I see no good reason for now giving to sec. 496, which is an exact reproduction of sec. 516, an effect which the latter did not have, and obviously was not meant to have, in the original Act.

If, however, sec. 496 should be held to modify or qualify anything in sec. 498, I would incline to the view that it would be the principal or introductory clause. If so, it would apply to each of the sub-clauses of sec. 498 and no change would have been effected by striking out the word "unlawfully." While, as pointed out by Phippen, J., in *The King v. Gage* (No. 1), 13 Can. Crim. Cas. 415, there are serious difficulties in reading clause (b) of sec. 496 as wholly unrestricted (the learned Judge treating clauses (a), (c) and (d) as specifying particular instances of a generic offence covered by clause (b)), thought the word "unduly" should be read into it, as at present advised I am not prepared to accede to the view expressed by Howell, C.J.M., in *R. v. Gage* (No. 2), 13 Can. Crim. Cas. 428, at p. 430, and referred to in *The King v. Clarke* (No. 2), 14 Can. Crim. Cas. 57, at p. 63, that clause (b) of sec. 498 should be confined in its application to such agreements as are declared to be conspiracies in restraint of trade by sec. 496. But it is not now necessary to determine that question, and I allude to it merely to avoid any possibility of leaving the

impression that I would import into the clause (b) the word "unlawfully."

The single, if not simple, question before us is whether in the instrument under consideration the parties agreed "to unduly prevent or lessen competition in the . . . purchase . . . (or) sale" of junk and bottles.

It is, perhaps, doubtful whether there is in the agreement any sufficiently definite provision as to sale prices to bring it within the statutory prohibition. But there is a distinct undertaking as to purchase prices to be paid by the parties, which I cannot read as aught else than a mutual promise that during the currency of the agreement neither would pay for bottles or junk prices higher than those specified in the schedules. That this agreement tended "to prevent or lessen competition" between the parties to it in the purchase of the scheduled articles there can be no question. In view of the fact that they controlled from 90 to 95 per cent. of the junk business in the territory in which they operated (a circumstance most material and proper for consideration in determining the true nature of the agreement, its purpose and the intent of the parties to it) it seems to me equally clear that, if carried out, it would tend to destroy in that territory all substantial competition in the purchase of junk and bottles and to leave the public as to the market price for these articles entirely at the mercy of the contracting parties.

The suggestion that, if too great a depression in prices should result, competition would be invited rather than discouraged seems to ignore the fact that provision is made for consultation between the parties as to sale prices and that it is declared to be the intent of their arrangement that they are to work for the mutual advantage of both. The evidence establishes that the prices to which they bound themselves to adhere in purchasing the scheduled articles were materially smaller than had been paid by them when there was competition between them. Of course, it would be to their mutual interest to place these prices as low as practicable, yet not to put them so low nor to raise their sale prices so high that the margin of profits would invite the in-

vasion of their field by really formidable rivals. Were such an invasion threatened they had it in their own hands at any time to reduce their sale prices to meet it. Small competitors they were in a position to crush. I have no doubt that the purpose of the agreement was to prevent or lessen competition in the purchase of junk and bottles for the advantage of the parties, without regard to the public interest, but with the certain incidental consequence that the latter interest would suffer as the result of the provision for a substantial reduction in such purchase prices below what they would be under fair competition. It is not open to question that the agreement was well calculated to accomplish its purpose.

But every agreement to prevent or lessen competition is not declared to be an offence. The elimination or diminution of competition must be undue. It is suggested that if "unduly" does not mean "unlawfully"—and the history of the section seems to forbid such an interpretation—it is used as the equivalent of "unreasonably," and that before an agreement can be said to provide for unduly preventing or lessening competition, the Court must be satisfied that it is designed to do so to an extent not reasonably necessary for the protection of the interests of the parties to it, whatever may be its effect upon the interests of the public. I cannot accept that suggestion. It would re-introduce the common law test of illegality as defined in the modern case—such as *Collins v. Locke*, 4 A.C. 674; *Dubowski v. Goldstein*, [1896] 1 Q.B. 478, 484, and others referred to in the judgments of the provincial Courts and at bar in this Court. If deemed an interchangeable equivalent of "unduly" the presence of the word "unreasonably" in clause (c) of sec. 520 as originally enacted and now found in sec. 498, is scarcely intelligible. If the word "unreasonably" were used in the statute instead of "unduly" there might be much to be said for the view that any agreement reasonably necessary for the protection of the parties to it is not in contravention of sec. 498.

The difference, in my opinion, between the meaning to be attached to "unreasonably" and that which should be given to

"unduly" when employed in a statutory provision such as that under consideration, is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement is unnecessarily great, having regard to the business requirements of the parties, whereas under the latter the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition, the benefit of which is the right of every one: *The King v. Elliott*, 9 Can. Crim. Cas. 505, 520.

Applying this test to the agreement before us, when we find that it was designed and, if carried out according to the intent of the parties, would be effectual to destroy all competition in the articles which it covered throughout the extensive territory in which they operated, that it was intended to bring about a material reduction directly in the prices which had been paid to junk and bottle collectors and indirectly in the prices which had been paid to the public for the purchase of such articles when competition was unfettered and which would obtain under fair competition, and that the situation was such that the parties to the agreement were not subject to other competition and were in a position effectively to combat the introduction into their territory of other competitors, the proper conclusion seems to be that it was an agreement unduly to prevent or lessen competition in the purchase of these articles.

I might add that if, notwithstanding its utter disregard of the public interest and the incidental prejudice to that interest which it was calculated to cause, such an agreement would nevertheless be lawful if shewn to be reasonably necessary for the protection of the business interests of the parties to it, the evidence in the record does not establish such necessity. The effect of the operation of the agreement would appear to have been to increase the profits which the parties had been previously making by upwards of 15 per cent.—an object which though legitimate, or even laudable, does not sanction the employment of illegal or pro-

hibited means to attain it. It is not established that the profits made by the plaintiff and defendants before the agreement in question was entered into, were not reasonably sufficient; still less that the increase provided for and brought about was indispensable to their conducting reasonably successful business enterprises.

It may be that to give effect to the defendants' plea of illegality will enable them dishonestly to escape from the consequences of a bargain which they made fully understanding and appreciating its effect. But that the purpose of Parliament in enacting sec. 498 of the Criminal Code should be carried out and that the influence of its provisions for the protection of the public interests should not be weakened or impaired is much more important than that in a particular case a party to an illegal agreement should be prevented from dishonestly evading his private obligations.

I would, with respect, allow this appeal and restore the judgment of the learned trial Judge. The appellants should have their costs in this Court and in the provincial Court of Appeal.

Appeal allowed.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE BARKER, C.J., LANDRY, WHITE, BARRY, AND McKEOWN, JJ.

THE KING v. MATHESON; Ex parte MARTIN.

1. INTOXICATING LIQUORS (§ III—I—91)—TRIAL OF OFFENDER IN HIS ABSENCE—PRESENCE OF COUNSEL.

A magistrate may try a person in his absence for selling liquor without a license where he has been duly summoned and is represented by counsel at the trial.

2. SUMMARY CONVICTION (§ III—30)—PROCEDURE—SALE OF LIQUOR WITHOUT LICENSE—ABSENCE OF ACCUSED—REPRESENTATION BY COUNSEL.

A conviction will not be quashed on the ground that the magistrate did not comply with sub-sec. (a) of 85 of the Liquor License Act of N.B. 1903, by asking accused as to his former conviction of a similar offence where counsel appearing for accused in the absence of the latter, was interrogated thereto, but made no answer.

[*Ex parte Groves*, 24 N.B.R. 57, applied.]

3. INTOXICATING LIQUORS (§ III K—94) — SECOND AND SUBSEQUENT OFFENCES—ORDER OF TIME IN PROVING—LIQUOR LICENSE ACT (N.B.) 1903.

Offering in evidence before an accused person was found guilty of the subsequent offence on a trial for a second offence of selling liquor without a license, of a certificate of his former convictions, is not such a violation of sub-sec. (a) of sec. 85 of the Liquor License Act of N.B. 1903, as will oust a magistrate of jurisdiction, where the latter, upon objection to the admission of such certificate, did not proceed further with such inquiry until the accused was found guilty of the subsequent offence, as such provision of the Liquor License Act relative to the order of time to be observed by the Court in proving the first and second offences is directory only except as to the question to be put to the accused.

[*Rea v. Graves* (No. 2), 16 Can. Cr. Cas. 318, 21 O.L.R. 329, followed.]

DECIDED: February 23, 1912.

THIS matter came before the Court upon an order absolute for *certiorari* to remove into this Court and an order *nisi* to quash a conviction made by F. F. Matheson, police magistrate of the town of Campbellton, Restigouche county, against Peter Martin for having unlawfully sold liquor without a license therefor by law required, contrary to the provisions of the Liquor License Act, C.S. 1903, ch. 22. The conviction was made April 13th, 1911, and was for a second offence. The order for *certiorari* was granted upon the following grounds:—

1. The magistrate had no jurisdiction because he did not ask the accused whether or not he had been previously convicted of an offence against the Liquor License Act.

2. The magistrate had no jurisdiction to inquire regarding a previous offence and conviction without inquiring first in regard to the second offence.

3. The magistrate having first inquired in regard to the first or previous conviction he had no jurisdiction to inquire into the subsequent offence.

The facts are stated in the judgment of the Court delivered by LANDRY, J.

P. J. Hughes, shewed cause:—Section 85 (a) of the Liquor License Act, C.S. 1903, ch. 22, lays down the procedure for entering a conviction for second offence, but the provisions are directory only. It is solely a question of procedure at the

trial. The cases of *Ex parte Groves*, 24 N.B.R. 57, and *Ex parte Grieves*, 29 N.B.R. 543, decide that it is not necessary for the accused to be present in person but it is sufficient if he is represented by counsel. Defendant's counsel was present in this case and could have been asked regarding a previous conviction.

[BARRY, J.:—*Rex v. Thompson*, [1909] 2 K.B. 614, is *contra*.]

Hughes:—It is claimed that the magistrate was prejudiced because a certificate of conviction of a previous offence was received in evidence before the magistrate had decided on the offence in question but he could not have been prejudiced because the first conviction was made by himself.

[LANDRY, J.:—The policy of the Act is that subsequent offence should be tried without reference to a previous conviction.]

Hughes:—In *Reg. v. Brown*, 16 O.R. 41, it was held that similar provisions in the Canada Temperance Act were directory only. The Court will not quash the conviction in any case because it could reduce the conviction to one for a first offence.

Phinney, K.C., in support of the order *nisi*:—The magistrate is to inquire into the subsequent offence only.

[BARKER, C.J.:—If a magistrate asked a question and there was no answer, would he lose his jurisdiction. In Ontario and in Nova Scotia they held this section 85 (a) to be imperative: *Rex v. Nurse*, 7 O.L.R. 418, 8 Can. Cr. Cas. 173; *Reg. v. Edgar*, 15 O.R. 142; *Rex v. Graves*, 16 Can. Cr. Cas. 318, 21 O.L.R. 329, 346. The magistrate loses his jurisdiction when he inquires into the first offence before the subsequent offence.]

[McKEOWN, J.:—The only thing done here was to put in a certificate of conviction.]

Phinney:—I cite *Reg. v. Salter*, 20 N.S.R. 206; *Reg. v. Porter*, 20 N.S.R. 352; *Charnock v. Merchant*, [1900] 1 Q.B. 474; *Rex v. Coote*, 22 O.L.R. 269, 17 Can. Cr. Cas. 211. The sections of the Act which cover irregularities in procedure do not affect sec. 85 (a) because this matter goes to the jurisdiction.

P. J. Hughes, in reply.

February 23, 1912. The judgment of the Court was delivered by

LANDRY, J.:—The question involved in this case is the jurisdiction or power of the magistrate to convict of a second offence against the Liquor License Act, C.S.N.B. 1903, ch. 22, under the following conditions:—

Martin was summoned to answer a charge of a second offence of having unlawfully sold liquor without license. On the day of the hearing Martin himself was not present, but appeared by counsel. The magistrate on opening the case, first received evidence to shew that Martin had no license. Then the prosecution offered in evidence a certificate proving that Martin had been convicted of a former offence. To this certificate the accused's counsel objected on the ground of irrelevancy, but did not suggest the objection that at that stage it was not permissible to enter into the proof of the first offence. The magistrate proceeded no further with the enquiry into the first offence, but went on to hear the evidence on the second offence. Having heard all the evidence, and the accused offering no evidence, the magistrate found him guilty of the second offence. Then he asked the counsel of the accused,—the accused being absent— if Martin had previously been convicted as alleged in the information. Counsel offered no answer as to that. Then the certificate establishing the conviction of the first offence against the accused as charged was offered in evidence, and received subject to the following objection: "The magistrate has no jurisdiction to convict, inasmuch as the provisions of section 85, sub-section (a) of the Liquor License Act have not been complied with, but the magistrate has enquired into the first offence before enquiring into the subsequent one, and therefore the magistrate has no jurisdiction to convict. The objection was overruled, and the accused convicted of the offence as charged.

The further ground of objection was taken on obtaining the order that the accused being absent he could not be proceeded against.

Sub-section (a) of sec. 85 of the Liquor License Act, C.S. N.B. 1903, ch. 22, reads as follows:—

The justices or police magistrate shall, in the first instance, inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be sentenced accordingly; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such questions, the justice or police magistrate shall then inquire concerning such previous conviction or convictions.

This question in several forms has been before the Courts of Ontario, Nova Scotia and New Brunswick. In *Rex v. Nurse* (1904), 7 O.L.R. 418, 8 Can. Cr. Cas. 173, a case which I judge from the report was conducted exactly as this one, the Divisional Court unanimously held that the magistrate having, before enquiring into the second offence, received improper evidence, ousted himself of his jurisdiction, and that he could not restore such jurisdiction by striking out the wrongly admitted evidence and thereafter proceeding regularly. In *Ex parte Groves*, 24 N.B.R. 57, under a provision in the Canada Temperance Act, worded as this is, it was held that the accused person could be proceeded against in his absence from the Court, and that his counsel might be asked for him if he was previously convicted as charged. The Supreme Court of Nova Scotia in *Regina v. Salter*, 20 N.S.R. 206, held just the reverse.

The reasons given by Allen, C.J., in *Ex parte Groves*, 24 N.B.R. 57, seem to me quite sufficient to support the decision handed down in that case. By that decision then our Court has held that the accused need not be present if counsel represents him. In the case before us, he was represented by counsel for all purposes, so that point cannot avail him.

There remains to dispose of, the ground taken, that evidence having been given touching the first offence before enquiring

into the second offence, the jurisdiction was ousted and could not be restored. On this point decisions of the Ontario and Nova Scotia Courts prevent my arriving at the conclusion I have, with the assurance I would feel were it not for those decisions.

It is to be observed here that the wording of the statute in which are to be found the words, "he shall then and not before," apply specifically to the question to be asked the accused and does not in terms refer to the enquiry into the first offence in other respects. It is only by inference and not in positive words that the time is fixed for enquiring into the first offence by the magistrate. In the case before us neither the accused nor his counsel was asked about the first offence before the enquiry and finding on the second offence. All that was done, was that by mistake or inadvertence, the magistrate admitted in evidence a certificate of a conviction for a first offence before he heard all the evidence and concluded in the matter of the second offence. Objection being taken to this course on the ground of irrelevancy he proceeded no further with the enquiry as to the first offence till he had concluded the evidence and decided as to the second offence. And having done this he proceeded in the way indicated by the statute having no regard to the certificate put in evidence by inadvertence and in effect withdrawn as to the first offence. He asked the counsel of the accused if the accused had been previously convicted for a first offence, and on receiving no reply, proceeded to prove the conviction for the first offence by receiving the evidence necessary to establish it.

I do not think the mere receiving of a certificate of a conviction for a first offence under the conditions of this case, virtually withdrawn when an objection is taken to it, not acted upon in any way either in the consideration of the second offence or in the proving of the first after the second has been pronounced upon, affects the jurisdiction of the magistrate. What there is in sub-sec. (a) of section 85 before cited as to

the order of time to be observed by the Court in proving the first and second offences outside of the question to be put to the accused, seems to me to be directory only. The question to be addressed to the accused, it is true, must be asked after the accused has been found guilty of the second offence, "and not before." That was done in this case. It has been held in Ontario (*Rex v. Graves*, 16 Can. Cr. Cas. 318, 21 O. L.R. 329, at pp. 346, 347), that with the words "and not before" struck out of the Act the balance of the sub-section is directory only and not imperative. If that is a correct interpretation, and I believe it is, that which was done in this case and insisted upon as ousting the magistrate of his jurisdiction, viz., the receiving of a certificate of a previous conviction before the adjudication was had on the second offence, was not done in opposition to an imperative direction in the statute. It therefore amounted to an irregularity only, and was wholly cured by disregarding it afterwards, and by a proper procedure to the end thereafter. If the offence as charged, viz., a second violation, was not clearly proven, and if there could be a reasonable question of the guilt of the accused, this Court might perhaps in the exercise of its powers set aside the conviction for irregularity of proceedings in regard to the certificate; but I cannot believe that such irregularity affects the jurisdiction.

The order *nisi* to quash should be discharged.

Order nisi discharged.

[SUPREME COURT OF ALBERTA.]

BEFORE SIMMONS, J., IN CHAMBERS.

Re BAPTISTE PAUL.

(Decision No. 1.)

1. SUMMARY CONVICTION (§ III—30)—ILLEGAL METHOD OF COMPELLING ATTENDANCE TO ANSWER CHARGE.

Whether the defendant was illegally arrested or not is not material to the jurisdiction of a magistrate under the summary convictions clauses of the Criminal Code when the accused is brought before him to answer a charge as to which an information had been properly laid before such magistrate.

[*Reg. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied; *McGuinness*

v. *Dafoe*, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see *contra*, *Re Paul* (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25.]

2 HABEAS CORPUS (§ I C—12a)—ILLEGAL PROCEEDINGS—ARREST WITHOUT WARRANT.

The fact that a person charged before a magistrate with an offence punishable on summary conviction had been brought before the magistrate under arrest without warrant, although a warrant was required by law, does not go to the jurisdiction of the magistrate, nor affect the validity of a conviction and commitment made at the hearing.

[*Reg. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied; *McGuinness v. Dafoe*, 3 Can. Cr. Cas. 139, 23 A.R. (Ont.) 704, referred to; but see *contra*, *Re Paul* (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25.]

DECIDED: September 13, 1912.

AN application by way of *habeas corpus* on behalf of one Baptiste Paul, who was tried and convicted under the Indian Act before two justices of the peace for supplying liquor to an Indian.

The application was refused.

J. MacKinlay Cameron, for applicant.

Stanley L. Jones, for respondent.

SIMMONS, J.:—The grounds raised in support of the application which I deem necessary to consider are:—

(a) That the information was laid before one only of the magistrates who tried the defendant.

(b) That the magistrates had no jurisdiction because the defendant was illegally brought before the magistrates, having been arrested without a warrant some time after the offence was committed.

(c) That the informant was interested in the result of the trial, as a moiety of the fine went to him under the Indian Act.

The cases cited in support of the first ground are *Ex parte White* (1897), 3 Can. Cr. Cas. 94, 34 N.B.R. 333, and *Reg. v. Ettinger* (1897), 3 Can. Cr. Cas. 387, 32 N.S.R. 176. Both the Nova Scotia and New Brunswick cases were prosecutions under the Canada Temperance Act. The remarks of Ritchie, J., in *Reg. v. Ettinger*, 3 Can. Cr. Cas. 387, 32 N.S.R. 176, clearly point out the distinction between the section of the Canada Temperance Act under the authority of which the information was laid and

sec. 842, sub-sec. 3, of the Code, now section 708 of R.S.C. 1906, ch. 146.

But aside from this the wording of section 708 is so clear and unmistakable that I fail to appreciate the reasons that led counsel to raise this question.

As to objection (b) this matter was fully considered in *Reg. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, and I have no hesitation in following this decision. Whether the defendant was illegally arrested or not is not material once he was before two magistrates having authority to deal with the charge laid against him by a proper informant. *Reg. v. Hughes*, 4 Q.B.D. 614, was followed in the Ontario Court of Appeal in *McGuinness v. Dafoe*, 23 A.R. (Ont.) 704, 3 Can. Cr. Cas. 139.

The third ground of objection, that the informant was interested in the result of the action, affects only the circumstances of the arrest and in no way has it any bearing on the question of jurisdiction of the magistrates. The Act distinctly provides in section 135 that "a moiety of such penalty shall belong to the informer or prosecutor."

The application is, therefore, refused.

Discharge refused.

[SUPREME COURT OF ALBERTA.]

BEFORE BECK, J.

Re BAPTISTE PAUL.

(Decision No. 2.)

1. SUMMARY CONVICTION (§ III—30)—ILLEGAL METHOD OF COMPELLING ATTENDANCE TO ANSWER CHARGE.

Where a statutory offence is made punishable upon summary conviction and a statutory method of compelling the attendance of the accused is provided, an omission of such statutory method and the illegal arrest of the accused as a means of bringing the accused before the magistrate will constitute a valid objection to a summary conviction obtained as a result of the illegal proceedings, where the irregular procedure was objected to by the accused.

[*Pearks v. Richardson*, [1902] 1 K.B. 91, 71 L.J.K.B. 18, applied; and see *contra*, *Re Paul* (No. 1), 20 Can. Cr. Cas. 159, 7 D.L.R. 24.]

2. SUMMARY CONVICTION (§ III—30)—OBJECTION TO ILLEGAL PROCESS—WAIVER.

Unless the accused who has been brought before a magistrate to answer a charge punishable on summary conviction objects before the magistrate to the illegal method whereby his attendance has been compelled, *ex. gr.*, by an arrest without warrant where a warrant is essential, the objection is considered as waived.

[*Regina v. Hughes*, 4 Q.B.D. 614, and *Dixon v. Wells*, 25 Q.B.D. 249, considered.]

3. HABEAS CORPUS (§ I C—12a)—ILLEGAL PROCEEDINGS—ARREST WITHOUT WARRANT—PROTEST BY ACCUSED.

A prisoner whose attendance for trial by a magistrate in a summary conviction matter has been compelled by arrest without warrant in a case where a warrant is required by law, will be discharged upon *habeas corpus* from the commitment following conviction, if he protested before the magistrate against the illegal procedure.

[See *contra*, *Re Paul* (No. 1), 7 D.L.R. 24.]

4. HABEAS CORPUS (§ I B—7)—RENEWAL OF APPLICATION ON SAME GROUNDS.

Subject to any statutory restriction of the right, an application for a writ of *habeas corpus* for the discharge of a prisoner from custody may be renewed before another judge of co-ordinate jurisdiction, notwithstanding that a similar application upon the same grounds had been refused by the judge to whom the application was first made.

[See also to the same effect, *R. v. Carter*, 5 Can. Cr. Cas. 401, *Re McKensie*, 14 N.S.R. 481; *Re J. W. Black*, Cong. Dig. 614; but as to the effect of a statutory right of appeal, see *Re Hall*, 8 A.R. (Ont.) 135; *Re Harper*, 23 O.R. 63; *Taylor v. Scott*, 30 O.R. 475.]

DECIDED: September 25, 1912.

MOTION for a writ of *habeas corpus* or for prisoner's discharge without the issue of the writ in respect of his conviction and commitment for supplying liquor to an Indian contrary to the Indian Act, R.S.C. 1906, ch. 81.

The order was made for discharge.

J. MacKinlay Cameron, for applicant.

F. S. Selwood, for respondent.

BECK, J.:—This is an application for a writ of *habeas corpus* or for discharge of the prisoner without the actual issue of the writ.

A similar application was before my brother Simmons and dismissed, *Re Paul* (No. 1), 20 Can. Cr. Cas. 159, 7 D.L.R. 24. It is, nevertheless, my duty to consider the present application independently of and uninfluenced by the decision of Simmons, J., *Cox v. Hakes*, 15 A.C. 506, at 514, 523, 60 L.J.Q.B. 89.

One of the grounds taken on the prisoner's behalf is that the magistrate was without jurisdiction to try the prisoner, inasmuch as he had been brought before the magistrate by an illegal method and had not submitted to the magistrate's jurisdiction even impliedly, but on the contrary had protested and taken exception to it.

There is no doubt that where the jurisdiction of the magistrate extends to the class of offences with which the accused is charged, and to the class of persons of whom the accused is one, not only all irregularities in, but even the entire absence of, process to compel the accused's appearance may be waived and will be deemed to be waived if the accused does not take and insist upon the objection. There is ample authority for this proposition. *Regina v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, was among the cases cited and, as pointed out in *Dixon v. Wells*, 25 Q.B.D. 249, 59 L.J.M.C. 116, the language of some of the Judges in the former case, though not necessary for the decision, indicate that in their opinion the protest of the accused would make no difference and would be of no avail.

The latter case, however, does recognize the distinction; that is, the effectiveness of a protest. It is again recognized by Lord Alverstone, C.J., in *Pearks, Gunston & Tee, Ltd. v. Richardson*, [1902] 1 K.B. 91, 71 L.J.K.B. 18. That view appears to be taken also in Halabury's Laws of England, vol. 19, tit. "Magistrates," p. 594.

In my opinion there is good ground for the distinction, else, e.g., for an illegal arrest, there would be no remedy except the many times worthless one of a civil action.

In the present case it appears that the accused was arrested without warrant by a constable. There seems to be no authority for an arrest without warrant in the circumstances of this case.

As objection was taken upon this ground to the jurisdiction of the magistrates and, as it was distinctly insisted on, I am of opinion the magistrates were without jurisdiction. My brother Simmons appears not to have adverted to the distinction which

I have pointed out. I, therefore, direct the prisoner's discharge. I have not considered the various other grounds and points of argument raised before me.

Order for discharge.

[POLICE MAGISTRATE'S COURT, CITY OF REGINA,
SASK.]

BEFORE POLICE MAGISTRATE TRANT.

CITY OF REGINA v. SHARLEY.

1. HEALTH (§ III A—10)—REGULATION OF MILK VENDORS—LICENSE—CLERICAL ERROR—REFORMATION.

Under an information for alleged violation of a sanitary by-law of a municipal corporation against an alleged licensed dairyman for selling milk in the year 1912 below a certain standard, where the defendant seeks to escape the provisions of the by-law upon the ground *inter alia* that his last license as a dairyman which he produced read for the year 1911 but it is shewn that the period which both the issuer of the license and the licensee himself had really intended to cover in the document was the year 1912, and that the variance was a mere clerical error, the license will be read as covering the year 1912 (not 1911) under the maxim, "*Falsa orthographia non vitiat cartam.*"

2. MUNICIPAL CORPORATIONS (§ IIC 3—108)—BY-LAW—ULTRA VIRES — ADULTERATION ACT (CAN.).

Where the Adulteration Act, R.S.C. 1906, ch. 133, penalizes the sale of milk below a certain standard but makes no provision thereunder by which municipal corporations may enact prohibitory by-laws fixing a standard of milk under the Act, and where the Province of Saskatchewan has not legislated in reference thereto, a municipal corporation in Saskatchewan is without authority to pass such a by-law.

[*Russell v. The Queen*, 7 A.C. 829, and *Regina v. Stone*, 23 O.R. 46, referred to. See also R.S.C. 1906, ch. 133, secs. 26, 31.]

DECIDED: August 22, 1912.

TRANT, P.M.:—On the 16th day of August, 1912, J. W. Sharley was before me charged on the oath of the Medical Health Officer for the city of Regina, in the Province of Saskatchewan, that on the 19th day of July, 1912, at the city of Regina aforesaid, he did have in his possession, care, custody or control, milk which contained less than the required standard of butter fat, to wit: 3 per cent., the said standard being 3.5 per cent., contrary to sec.

23 of by-law 411 of the city of Regina. The sanitary inspector stated in his evidence that the accused was a licensed dairyman and that he had taken milk from his cans that the Babcock tester shewed to contain less than 3.5 per cent. butter fat.

Mr. Embury, for the defence, raised two points: First, that the printed copy of the license put in shewed that the license only extended from the 1st day of January, 1911, to the 31st December, 1911; secondly, that the by-law was *ultra vires*, the legislation governing the quality of milk being the Dominion Adulteration Act, which did not give power to any municipality to make such a by-law as that under which these proceedings were taken.

I adjourned the hearing until the 22nd day of August, 1912, to examine the objections. On the said date I do rule on the points as follows:—

First: as regards the copy of the license. The wrong date is so obviously a printer's error that, extending the principle of the old maxim *Falsa orthographia non vitiat cartam*, and seeing that evidence was given that the accused is a licensed dairyman, I have no hesitation in overruling the objection.

Secondly: the section of the by-law under which the summons was issued is as follows:—

No person or corporation licensed under this by-law shall keep, sell, offer for sale, convey or deliver, or have in his or its possession, charge or control any milk in the city if such milk contains more than 88 per cent. of watery fluids or less than 12 per cent. of total solids or less than 3.5 per cent. of butter fat.

I cannot understand where the city council obtained authority to make such a by-law. There is no such power under provincial legislation neither in the City Act nor in the Public Health Act. This is not accidental as doubtless the provincial Legislature recognised that such authority would be *ultra vires*.

The quality of milk is not a local question. Milk is consumed over the whole of the Dominion of Canada and the regulations respecting its quality are provided by Dominion legislation. That legislation is precise and it directs the procedure which is

quite different from the procedure taken in this case. In the first place the Adulteration Act provides for the distribution of the samples taken and it also enacts that the analysis shall be made, not by the inspector, but by an analyst. There are other provisions, not one of which was obeyed in the present instance. This legislation, I repeat, is in the Dominion Adulteration Act and under that Act alone proceedings can be taken. I have therefore to declare that the section of the by-law under which these proceedings were taken is *ultra vires*, the field being covered by Federal legislation, namely, the Dominion Adulteration Act.

I am aware that it has been decided that when the question of *ultra vires* is raised if the by-law is enacted in good faith it should not be set aside unless it is proved to be so unreasonable, unfair and oppressive as to be a plain abuse of the powers conferred upon a municipal council. The present case is not within such rulings. Anyone who reads over the Dominion statute will see that it would be unreasonable, unfair and oppressive to confer such a power upon a municipality, as in that case every municipality might have a different standard for the quality of milk. Whereas under the Dominion statute the standard is fixed by the Governor-General in Council.

In declaring this section of the by-law *ultra vires* I am supported by the great case of *Russell v. The Queen*, 7 A.C. 829; *Rex v. Garvin*, 14 B.C.R. 260; *Regina v. Stone*, 23 O.R. 46; *Rex v. Ferries*, 15 W.L.R. 331, and other cases.

There is no occasion, therefore, for the accused to be put on his defence, and I do dismiss the case.

H. J. Foik, for the city.

J. F. L. Embury, for the defence.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSHEND, C.J.

THE KING v. FRASER.

1. HABEAS CORPUS (§ I C—12)—LACK OF JURISDICTION—MISAPPREHENSION OF MAGISTRATE—AFFIDAVIT—QUESTION TO BE CONSIDERED—EXCESSIVE SENTENCE.

An application for the discharge of defendant from gaol, under an order in the nature of a habeas corpus, based upon the one ground that the committing magistrate, in sentencing defendant for a second offence against the provisions of the Nova Scotia Temperance Act, 1910, as amended by Acts of 1911, ch. 33, sec. 8, was under a misapprehension as to his powers and sentenced the defendant for a longer term (three months) than he would have done if he had any discretion in the matter as shewn by an affidavit of the magistrate, will not be entertained as it was not competent for the magistrate to make such an affidavit, or for the Court to consider such a question, the only question being whether or not the defendant was legally detained in custody.

2. HABEAS CORPUS (§ I C—12a)—COMMITMENT—WHEN PRISONER IS LEGALLY COMMITTED.

A prisoner is legally detained where a gaoler has returned a good warrant, based upon a conviction which was not attacked, and which was apparently regular, the law justifying the sentence imposed.

3. HABEAS CORPUS (§ I C—12a)—REVIEW OF COMMITMENT BY HABEAS CORPUS.

The court cannot on an application for the discharge of a prisoner from custody by way of habeas corpus review the action of the magistrate on the merits, or send the prisoner back to the magistrate to impose a lighter sentence where the sentence actually imposed was not in excess of what the law authorized.

4. INTOXICATING LIQUORS (§ III I—91)—PENALTY — WHETHER DISCRETIONARY.

The provision of sec. 24 of the Nova Scotia Temperance Act (N.S. Laws 1910, ch. 2, as amended N.S. Laws 1911, ch. 33) which declares that the offender on each subsequent conviction shall be "liable to imprisonment for three months," gives no discretion to the magistrate to lessen the term of imprisonment. (*Dictum per Townshend, C.J.*)

DECIDED: November 13, 1912.

DEFENDANT was tried before L. G. Crowe, Esq., stipendiary magistrate of the town of Truro, charged with keeping intoxicating liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, 1910, and it appearing that he had been

previously convicted of a similar offence, the offence now charged was adjudged to be a subsequent offence, and for such subsequent offence defendant was adjudged to be imprisoned in the common gaol of the county of Colchester for the space of three months.

An order in the nature of a habeas corpus was obtained requiring the keeper of the gaol to return immediately whether or not the defendant was detained in gaol, together with the day and cause of his having been taken and detained, and the 12th day of November, 1912, at 11 o'clock in the forenoon, at the Supreme Court Chambers at Halifax, was appointed as the time and place for hearing the application for the defendant's discharge.

To this order the gaoler returned the commitment. On the hearing of the application, counsel for defendant produced an affidavit from the committing magistrate setting out that previous to sentence being pronounced, it was submitted on behalf of defendant that under the provisions of the Nova Scotia Temperance Act, 1910, as amended by Acts of 1911, ch. 33, sec. 8, it was not obligatory that for the subsequent offence upon which he was convicted defendant should be sentenced to the full three months' imprisonment mentioned in said sec. 8; but that he was of the opinion that he had no discretion to make the sentence for any less period of time, otherwise he would have done so.

Sec. 8 referred to, after repealing the corresponding section of the principal Act and making provision for punishment of the offender in the case of a first offence, by fine or imprisonment, with or without hard labour, continues: "And on each subsequent conviction he shall be liable to imprisonment for three months with or without hard labour."

J. Philip Bill, for prisoner, in support of application.

J. L. Ralston, for prosecutor, *contra*.

HALIFAX, November 13, 1912.

SIR CHARLES TOWNSEND, C.J.N.S.:—The application in this case to discharge the prisoner from gaol is based on the one

ground that the stipendiary magistrate under the impression that he had no discretion, for a second offence against the Nova Scotia Temperance Act, 1911, sentenced the prisoner to three months' imprisonment, but, as he states in his affidavit, had he thought the law would allow him to make the imprisonment for a less period, he would not have given him the sentence he did.

It is not disputed that the conviction was legal, nor is it contended that the sentence was illegal, but that in view of what has been contended, in an erroneous interpretation of his powers, the magistrate has imposed a more severe sentence than he would otherwise have done.

I may in the first place observe that I do not think it competent for the magistrate to make such an affidavit, nor for the Court to consider such a question—at any rate on an application of this kind. My duty is confined to ascertain whether the prisoner is legally detained in custody. The gaoler returns a good warrant, based on a conviction not attacked, and so far as I know regular. The law justified the sentence imposed, and I find the prisoner is legally detained.

I have been referred to Halsbury's Laws of England, vol. 10, p. 39, where he describes the writ of *habeas corpus* as

an effective means of immediate release from unlawful or unjustifiable detention—

and it is contended that under the evidence it is here "unjustifiable." Assuming I can look at the magistrate's affidavit, how can I say that his detention is unjustifiable when the law says it is justifiable? I cannot on this application review the action of the magistrate on the merits, or even send the prisoner back to the magistrate to impose a lighter sentence.

If I do anything, it must be to discharge him from custody and he would then escape all punishment for an offence of which he has been properly convicted, and legally sentenced.

I regret that the interpretation of the statute as to the words "liable to imprisonment" cannot on this application come before me so as to enable me to give a judicial determination as to their meaning, but as I was pressed to express my view, I

may say that in my opinion, the magistrate was right. The law is obligatory and he has no discretion in the matter.

The application will be refused.

Application refused.

[SUPREME COURT OF ALBERTA.]

BEFORE WALSH, J.

THE KING v. LEY.

1. STATUTES (§ II A—104)—CONSTRUCTION OF STATUTE—"GREATER SPEED THAN ONE MILE IN FOUR MINUTES"—MOTOR VEHICLE ACT (ALTA.).

In sec. 20 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) ch. 6, the expression "greater speed than one mile in four minutes" means any speed for any distance less than a mile which if continued would result in a full mile being covered in less than four minutes, the word "speed" as therein used meaning rate of motion, and the words "one mile in four minutes" simply supplying the measure of the same.

[Sec. 20 of Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

2. STATUTES (§ II A—100)—CONSTRUCTION OF STATUTES—AMBIGUITY — DETERMINING PRINCIPLE WHERE EITHER OF TWO MEANINGS POSSIBLE.

Upon a question of construction of certain words in a statute, if the words in themselves are susceptible of either of two meanings, the court will adopt the more reasonable construction.

[Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, construed.]

3. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—INFORMATION — CHARGING OFFENCE UNDER STATUTE—VARIATION FROM WORDS OF STATUTE.

An information charging, under the Motor Vehicle Act (Alta.), the offence as driving "at a greater speed than fifteen miles per hour" instead of in the words of the statute "at a greater speed than one mile in four minutes," charges the identical offence covered by the words of the statute and is sufficient, although it may be the better practice in such cases to follow the words of the statute itself.

[Sec. 20 Motor Vehicle Act, 2 and 3 Geo. V. (Alta.) ch. 6, referred to.]

DECIDED: September 3, 1912.

An information was laid against the defendant, charging him with having driven an automobile along a public street in the city of Calgary "at a greater speed than fifteen miles an hour, contrary to sec. 20 of the Motor Vehicle Act." Upon his

appearance before the police magistrate objection was taken that the information disclosed no offence. This objection was overruled and the trial proceeded. The police magistrate found as a fact that the defendant drove his automobile on the occasion in question 110 yards in $10\frac{1}{2}$ seconds and he convicted him.

J. MacKinley Cameron, for appellant.

F. S. Selwood, for respondent.

WALSH, J. :—At the request of counsel for the defendant the magistrate has stated a case under sec. 761 of the Code in which the following questions are submitted for the opinion of the Court:—

1. Did the information disclose an offence under sec. 20 of the Motor Vehicle Act?
2. Does sec. 20 of the Motor Vehicle Act mean that the rate of speed must not exceed fifteen miles per hour for any distance less than a mile?
3. Was there any evidence on which I could have convicted the accused of an offence under sec. 20?
4. Should I have given effect to the objections of the defendants' counsel and dismissed the information?

Sec. 20 above referred to reads as follows:—

No person shall operate a motor vehicle upon any public highway or street where the same passes through any city, town or village, at a greater speed than one mile in four minutes, nor at a greater speed than one mile in six minutes in turning a corner of an intersecting public highway or street in any city, town or village.

(2) If the rate of speed of any motor vehicle shall in any case exceed the limit herein defined, it shall be *prima facie* evidence that the person operating such motor vehicle is running the same at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the street or highway, or so as to endanger the life or limb of any person or the safety of any property.

(3) Provided also that the Lieutenant-Governor-in-council may make regulations governing the further use of highways in cities, towns and villages by the owners of the motor vehicles.

All of these questions submitted depend for their answer upon the meaning which is to be given to the words "at a greater speed than one mile in four minutes" which appear in this section. The defendant's "argument in brief" is that these words mean that a motorist must cover the full distance of one mile before subjecting himself to the penalties of the section and that

even then, so long as he occupies four minutes of time in so doing, the speed at which he covers any portion of the mile is immaterial. He says that these words simply limit the time within which one mile may be travelled and that they therefore have no application to a distance short of a mile. Mr. Cameron referred me to a great many authorities which deal with the principles governing the construction of statutes and he was good enough to hand to me after the argument a most excellent précis of the same. If there was in my mind any uncertainty whatever as to the meaning of the words which I have here to interpret, I no doubt would have found these authorities most helpful. But I have not had the slightest difficulty in reaching a conclusion as to what they mean and I am therefore disposing of this case without finding it necessary to refer here to any of them.

I think that the word "speed" as here used means "rate of motion" and the words "one mile in four minutes" simply supply the measure of the same. I interpret "speed" in this way on the authority of the best lexicographers. Webster's fourth definition of the word as a noun is

act or state of moving swiftly, swiftness, rapidity, dispatch, also rate of motion, velocity, as a high speed, the speed of a horse or vessel, a speed of 20 miles per hour, that is a rate of motion at any given time, that would, if continued, result in travelling 20 miles in an hour.

The fourth definition in the Century includes "rate of progress or motion." In my opinion, therefore, one who drives in a city, town or village an automobile for a portion of a mile at a speed greater than one mile in four minutes, that is to say at a speed which if continued would result in a full mile being covered in less than four minutes, is guilty of a violation of sec. 20. This is the natural and logical construction of the section arrived at without any straining of its language. Mr. Cameron's interpretation of it necessitates a transposition of these words, for to mean what he says they do, they should read,

no person shall operate a motor, etc. for one mile at a greater speed than four minutes.

My interpretation is in consonance with the spirit of the Act which undoubtedly is to give others than motorists some rights in the highways and it leads to no anomalies or incongruities. That the very opposite of this would result from the adoption of the defendant's view is easily capable of illustration. Under it a man who drives his car 1,759 yards in a minute (a feat which from my observation of motoring in Calgary is, I fancy, by no means impossible of performance) and then stops it and proceeds no further would not under the defendant's interpretation of it be guilty of a breach of this section, because the distance travelled by him falls short of a mile, though only by a yard. Neither would he be, if after so stopping his car he keeps it standing for three minutes and then proceeds, for he then takes four minutes to cover the mile. In other words, a man who only takes one minute to cover 1759 yards is immune from punishment under this section, whilst one who travels 1,760 yards in three minutes and fifty-nine seconds is subject to its penalties. Unless driven to it, no Court would do the legislature the injustice of holding that it meant to enact any such absurdity. Even if the words are capable of the meaning attributed to them by Mr. Cameron, which I very much doubt, they are certainly open to the construction which I place upon them and I should act upon the well known principle that where one of two constructions is open, the Court should adopt the more reasonable of them. The part of the same section which prohibits

a greater speed than one mile in six minutes in turning a corner of an intersecting public highway, can apply only to a corner which is a full mile in length if the defendant's contention is right, and I do not know any spot in Alberta where a man could be occupied for a whole mile in turning a street corner. This prohibition might apply to a mile race track if it was a street corner, which of course it is not. Mr. Selwood pointed out the similarity between these words and the language employed in section 393 (c) of the Railway Act, which prohibits a railway train from passing "in or through any thickly peopled portion of any city, town or village at a speed

greater than ten miles an hour." This prohibition would be entirely nugatory if Mr. Cameron's construction of the very similar phraseology of the section in question is the right one.

The fact that in other portions of this Act and in the former Act, which is repealed by it, and in similar Acts of other provinces, the words "rate of speed" are used, could only help the defendant, if at all, if there was a difference in meaning between "speed" and "rate of speed" which I do not think there is, at least as here used.

The defendant cannot escape conviction on the ground that the information charges the offence as driving at a greater speed than fifteen miles per hour, instead of in the words of the statute. The offence charged is identical with that provided against by the statute, for one who drives at a greater speed than one mile in four minutes certainly drives at a greater speed than fifteen miles an hour. There is, however, no reason why the words of the statute should have been departed from. Police officials will find it far easier and much safer to follow the words of a statute which create an offence than to employ language of their own to describe it.

My answers to the questions submitted are; to No. 1, Yes; to No. 2, Yes; to No. 3, Yes; and to No. 4, No.

In accordance with the understanding arrived at on the argument, I make no order as to costs.

Judgment accordingly.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., MEAGHER, RUSSELL, DRYSDALE, AND
RITCHIE, JJ.

THE KING v. McNUTT.

1. INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—N.S. TEMPERANCE ACT 1910, CH. 2, SEC. 44.

Where on the trial for an offence against the provisions of the Nova Scotia Temperance Act, the prosecutor in answer to a question as to whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, replied in the affirmative, this question

and answer before adjudication of the principal charge does not constitute an enquiry by the magistrate "concerning such subsequent offence," in contravention of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, and a motion for the discharge of the prisoner on *habeas corpus* will be refused.

2. STATUTES (§ II B—111)—DIRECTORY PROVISIONS—NOVA SCOTIA TEMPERANCE ACT 1910, CH. 2, SEC. 44.

The provisions of the Nova Scotia Temperance Act 1910, ch. 2, sec. 44, respecting proceedings for offences against Part I. of the Act in case of previous conviction or convictions are applicable to the procedure only and as such are directory and not imperative.

DECIDED: November 18, 1912.

MOTION before the Supreme Court for the discharge of the defendant on *habeas corpus*.

The application was refused.

On the 31st October, 1912, defendant was convicted before L. G. Crowe, Esq., stipendiary magistrate in and for the town of Truro, for unlawfully keeping intoxicating liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, John W. Waller being the informant.

The Nova Scotia Temperance Act, 1910, ch. 2, sec. 44, with respect to proceedings upon any information for committing an offence against the provisions of Part I., in case of a previous conviction or convictions being charged, enacts that:—

(a) The magistrate shall in the first instance enquire concerning such subsequent offence only, and if the accused is found guilty thereof he shall then, and not before, enquire concerning such previous conviction, etc.

It appearing to said magistrate that said defendant was previously, to wit, on the 2nd day of May, 1912, convicted of a like offence, the magistrate adjudged the offence first mentioned to be an offence committed subsequent to the last mentioned offence and for said subsequent offence ordered the defendant to be imprisoned in the common gaol of the county of Colchester for the term of three months. A motion for the discharge of the defendant on *habeas corpus* was made before the Chief Justice at Chambers and having been refused was now renewed before the full Court. The facts are fully stated in the following opinion of Russell, J.

J. J. Power, K.C., in support of appeal:—The magistrate presiding at the trial made enquiries in reference to a previous conviction of the accused contrary to the statute: N.S. Acts, 1910, ch. 2, sec. 44; *R. v. Nurse*, 8 Can. Cr. Cas. 173, 7 O.L.R. 718; N.S. Acts, 1911, ch. 33, sec. 14; *R. v. Oddie*, 2 Dennison's Cr. Cas. 264; *R. v. Gibson*, 18 Q.B.D. 537; *R. v. Allen*, 44 Can. S.C.R. 331; *Charnock v. Merchant*, [1900] 1 Q.B. 474; *R. v. Salter*, 20 N.S.R. 206; *R. v. Johnston*, 11 Can. Cr. Cas. 12; *R. v. Wallace* (not reported).

J. L. Ralston, contra:—The sections of the statute referred to are only in relation to procedure. The old statute provided that after the justice had enquired into the subsequent offence he could ask the accused whether he had been previously convicted; the new statute leaves that out and says that after convicting of the subsequent offence he shall enquire as to the previous offence. The old statute might be construed as forbidding the giving of evidence as to the previous conviction, whereas the new statute is plainly only a direction as to the procedure to be adopted.

The evidence was properly admitted by the magistrate: Phipson on Evidence, 5th ed., p. 57; *R. v. Bauld*, 6 Cr. App. R. 30; *Hales v. Kerr*, [1908] 2 K.B. 601; *R. v. Wyatt*, [1904] 1 K.B. 188. If the evidence of previous conviction was relevant the accused could be cross-examined in relation to the charge: Phipson, 5th ed., p. 434.

Power, K.C., replied.

GRAHAM, E.J., concurred in judgment of Russell, J.

MEAGHER, J.:—I agree with the distinction pointed out by Mr. Ralston, for the Crown, between the earlier and the later statute on the subject; but I cannot accept the argument for the defendant that the magistrate lost jurisdiction by reason of what took place on the trial before him. If I did, I should be overruling *The Queen v. Stevens*, 31 N.S.R. 124, which had the support of five Judges of the Court, which I am not prepared to do.

Finally, I do not consider that what took place was an en-

quiry by the magistrate at all. I mean the enquiry he is specially directed to make if the defendant is convicted of the subsequent offence. It was an enquiry by counsel as to the defendant for the purpose of discrediting her as a witness, and during the argument I saw his right to do so, at least, to the limited extent adopted here, which has not been abridged by the provision under review.

Illegal In any aspect the question and answer, at the most, elicited illegal evidence only, to which the magistrate could not give effect.

RUSSELL, J.:—The facts respecting the conviction of the defendant in this case are fully set out in the decision of the learned Chief Justice, which is as follows:—

This application under the Liberty of the Subject Act is for the discharge of the prisoner from custody on the ground of an illegal conviction for keeping liquor for sale in violation of the Nova Scotia Liquor License Act, 1911.

It appears from the affidavits that the prosecutor Waller a police constable was called as a witness, and asked by the prosecuting counsel whether the accused had been convicted of keeping intoxicating liquor for sale during the last year, and he replied that she had. No special conviction was mentioned nor were any particulars given of any such conviction.

The statute provides, sec. 44, as follows:—

The proceedings upon any information for committing an offence against the provisions of Part I., in case of a previous conviction being charged, shall be as follows:—

(a) The magistrate shall in the first instance inquire concerning such subsequent offence only, and if accused is found guilty thereof, he shall then, and not before, inquire concerning such previous conviction or convictions as alleged in the information.

(b) Any such previous conviction shall be provable by the production of a certificate under the hand of the committing magistrate, without proof of his signature or official character, or by any other satisfactory evidence.

Now it is quite plain from all the evidence before me that the magistrate did not first inquire into the previous conviction of the accused, but did so after he had convicted her of the subsequent offence as the law directs, unless it should be held that the question asked and answered by the witness Waller can be treated and regarded as a contravention of the Act. It seems very clear that the words of the section

44 are imperative, and that if, as a matter of fact, the magistrate did enter on the inquiry as to the previous offence before determining the subsequent offence, he was wrong and acted without jurisdiction, and the prisoner should be discharged: see *Rez v. Nurse*, 8 Can Cr. Cas. 176.

It was suggested by counsel for prosecutor that the evidence of Waller was not given nor received as evidence of previous conviction, but as evidence to prove the intent of the accused in having liquor on her premises, but I think this point was well answered that it was unnecessary as the Act makes the mere keeping an offence until the contrary is proved.

I am, however, of opinion, after carefully considering the whole matter, that Waller's evidence cannot be regarded as evidence of the previous conviction as required by the Act, and was not so offered or intended.

There is no evidence shewing any particular convictions of the accused, nor of the conviction specified in the summons. I take it that what the magistrate is forbidden to do is to enter into any inquiry of "such conviction or convictions as are alleged in the information." There is nothing to shew that Waller's evidence had any reference to this particular conviction. When the magistrate has convicted on the subsequent offence, then he must have legal evidence of the former conviction. None such was offered or given in the first instance by Waller.

For these reasons alone the motion for the prisoner's discharge must be refused.

Since writing the foregoing, I have been referred by Mr. Power to a decision of Russell, J., in *The King v. Passerini* (not yet reported).

I agree generally with the learned Judge in that case, but on turning to the printed case I find that the prosecutor was permitted by the magistrate to give full evidence as to the date, amounts and other particulars of the previous conviction as he states it: On the said 17th November, the first day of the said trial, and before the close of the case for the prosecution on the subsequent offence, the informant being on the stand, I allowed him to testify to previous convictions of the defendant, giving the dates and identifying the defendant.

This was in direct violation of the Act, but as I think nothing of the kind took place in this trial, I do not think the conviction can be quashed.

One way of testing the question in this case suggests itself. Assume that there was no other evidence offered to previous conviction except that given by Waller, was there lawfully sufficient evidence on which she could have been convicted of a second offence? I am quite sure there was not, especially as the law

requires evidence of the previous conviction as stated in the warrant.

I have examined *Dealtry's Case*, 7 Can. Cr. Cas. 443, but cannot see that it helps the defendant here.

The case of *Rex v. Passerini* (not reported) is distinguishable from the present in one respect, apart from that referred to in the decision of the learned Chief Justice. The statute then in force explicitly stated that the defendant should not "be asked" whether he had been previously convicted. These words are not in the statute now in force. All that is now forbidden is that the magistrate should "enquire concerning such previous conviction or convictions as alleged in the information." It is sufficient for the present purpose to say that the magistrate made no such enquiry and, therefore, there was nothing done that was in contravention of the statute. It would be going beyond anything decided in the case of *Rex v. Passerini* to say that the mere fact that a relevant, though unnecessary question put by the prosecutor to shew the intent with which the liquor was kept, amounted to an enquiry by the magistrate which by the terms of the statute he is forbidden to enter upon until after the defendant has been found guilty of the offence charged in the information.

At the same time I feel bound to say that, even under the terms of the former statute, if a case had been before the Court in which the charge was that of keeping for sale and evidence were given, although unnecessary, to prove the intent with which the liquor was kept, I should not now consider that the conviction was invalidated by the admission of such evidence. In other words, my impression is that Passerini was a very fortunate and possibly too fortunate prisoner.

DRYSDALE, and RITCHIE, JJ., concurred with Meagher, J.

Application refused.

[COURT OF KING'S BENCH, QUEBEC.]

(Crown Side.)

BEFORE TRENHOLME, J.

THE KING v. BONIN.**1. CRIMINAL LAW (§ II A—49)—JURISDICTION—SUMMARY TRIAL—THEFT UNDER \$10.**

The consent of the accused is essential for the summary trial by a magistrate under Cr. Code sec. 773(a) of a charge under sec. 379 of the Criminal Code (1906), of theft from the person of less than \$10.

[*The King v. Conway*, 7 Can. Cr. Cas. 129, referred to.]

DECIDED: September 16, 1911.

THE woman, Eugénie Bonin dit Gratton, had been arrested by detective McCann on the charge provided by article 379 of the Criminal Code, that is to say, for the offence of robbing on the person of Mrs. Patton, the sum of \$3, being the property of the said Mrs. Patton.

The prisoner having pleaded not guilty to the indictment was tried by Magistrate Lanctot on the 8th of September, 1911, and sentenced to six months' imprisonment with hard labour.

In support of his petition for *habeas corpus*, L. Houle, the petitioner's advocate, alleged that the magistrate had not jurisdiction to hear and decide of this cause summarily as he did, without proceeding to a preliminary hearing and without the prisoner's consent. This offence being by its nature an indictable offence, the accused had the right to a preliminary enquiry, and, moreover, she had the right of option either for a trial in the Court of Sessions of the Peace or to a trial by jury. That although the amount stolen was less than \$10, the said magistrate could not try summarily: *R. v. Conway*, 7 Can. Cr. Cas. 120.

J. C. Walsh, K.C., for the Crown.

MONTREAL, September 16, 1911.

TRENHOLME, J.:—The *habeas corpus* is maintained and the prisoner is ordered to be released, the magistrate not having jurisdiction, as it does not appear that the accused consented to be tried summarily.

Prisoner discharged.

[COURT OF KING'S BENCH, QUEBEC.]

(Crown Side.)

DISTRICT OF MONTREAL.

BEFORE SAINT-PIERRE, J.

THE KING v. KIRWIN.

1. SUMMARY CONVICTIONS (§ V—50)—SENTENCE AND IMPRISONMENT—CONVICTION AND COMMITMENT—POWER TO ALTER—CHANGING TO “HARD LABOUR.”

Where a prisoner was convicted of being a vagrant and sentenced to six months' imprisonment, and no provision was made for “hard labour” and thereafter the words “hard labour” were added in the absence of the accused, and as so changed the commitment was made out to conform to it, such change is invalid and the commitment will be set aside on *habeas corpus* proceedings.

[Criminal Code, sec. 727; see *R. v. McAnn*, 3 Can. Cr. Caa. 110; *Regina v. Hartley*, 20 O.R. 481, referred to.]

DECIDED: October 15, 1910.

THE petitioner had been sentenced in the Recorder's Court by Police Magistrate Adolphe Bazin, then acting as Recorder, to six months' imprisonment, for the offence provided by paragraph (a) of the article 238, of the Criminal Code (1906), that is to say, of being a vagrant, of having no visible means of existence and of living without having recourse to work.

L. Houle, on Kirwin's behalf, attacked the commitment by alleging that the said commitment was compelling the accused to hard labour when the conviction did not mention the same by any means, nor did the minute of adjudication mentioned at the back of the record.

During the course of the trial on the merit of the writ of *habeas corpus*, the petitioner desisted himself of the paragraphs 6, 7 and 8 of his petition as being allegations pertaining to appeal, and that could only be decided in appeal, leaving, however, the other allegations to the consideration of the Court.

The prisoner's counsel having asked for a copy of the conviction from the clerk of the Recorder's Court, the latter refused momentarily and it is only on the following day that he consented to deliver the copy asked for. But Mr. Houle having noticed that the first conviction had been altered by adding "hard labour" so that it may be in conformity with the commitment, gave his affidavit, which is fyled in the record, in order to prove that the copy of conviction No. 2 while mentioning "hard labour" was not in conformity with the first conviction, which did not mention it at all. And that, at all events, the minute of adjudication itself did not mention "hard labour."

This penalty of hard labour not having been imposed in the first place at the time of the adjudication, the said magistrate could not impose same subsequently and without the prisoner's knowledge. In other words, that this difference between the minute of adjudication and the commitment was fatal.

The petitioner's affidavit reads as follows: (1) That neither the magistrate, Adolphe Bazin, nor any other magistrate has ordered me to appear again before him, to condemn me to "hard labour," and I have signed. (Clary Kirwin.)

In support of the petition, there was cited article 727, Criminal Code; article 490, Montreal Charter, 1899; *R. v. Hartley*, 20 O.R. 485; *Ex p. Carmichael*, 8 Can. Cr. Cas. 19; article 1057, Criminal Code; *R. v. Walsh*, 2 O.R. 206; *R. v. Horton*, 31 N.S.R. 217; *R. v. Quinn*, 2 Can. Cr. Cas. 153; *R. v. Gévry*, 12 Can. Cr. Cas. 344; *R. v. McAnn*, 3 Can. Cr. Cas. 110.

D. A. Lafortune, K.C., for the Crown.

MONTREAL, October 15, 1910.

SAINT-PIERRE, J. :—The prayer of the petitioner Clary Kirwin will be granted, it appearing to me that the commitment is insufficient in law to warrant the detention of the said Clary Kirwin. He will, therefore, be discharged.

Prisoner discharged.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

BEFORE LAURENDEAU, J.

THE KING v. LANGLOIS; CITY OF MONTREAL mis-en-cause.

1. SUMMARY CONVICTIONS (§ III—30)—PROCEDURE—WHEN CONVICTION IS MADE—CRIMINAL CODE, 1906, FORM 32.

In proceedings by way of summary conviction the conviction consists in the pronouncement of sentence; the drawing up and signing of the conviction according to Form 32 of the Criminal Code, 1906, only establishes the conviction in proper form and is not a prerequisite to the signing of a warrant of commitment (Form 41, Crim. Code).

2. SUMMARY CONVICTIONS (§ VI—60)—CONVICTION PROCEEDINGS—NECESSITY OF USING WORD "CONVICTION."

The word "convicted" in Cr. Code Form 41 (warrant of commitment) is not absolutely essential to the validity of a warrant of commitment on summary conviction and other words of the like effect *eo. gr.* the words "declared guilty" are sufficient.

3. APPEAL (§ I C—25)—SUMMARY CONVICTION—ABSENCE OF SIGNATURE TO FORMAL CONVICTION—RIGHT TO APPEAL.

The fact that a formal summary conviction was not signed until some time after the sentence was pronounced does not deprive the accused of his right of appeal which lies as soon as the sentence is pronounced.

4. ARREST (§ I B—7a)—QUESTIONING LEGALITY OF ARREST WITHOUT A WARRANT AFTER CONVICTION.

When a person has been arrested, has pleaded not guilty, and has been tried and convicted in a summary conviction matter, it is too late for him then to raise the objection that he was illegally arrested without a warrant.

5. ARREST (§ I B—7)—WITHOUT A WARRANT—OFFENCES AGAINST ACT REGULATING SALE OF COCAINE, OR MORPHINE.

An arrest may be made without a warrant in the case of offences under the Act, 1 Geo. V., 2nd session, ch. 35 (Que.), being an Act to regulate the sale of cocaine, morphine and their compounds.

DECIDED: December 30, 1911.

PETITION for writ of *habeas corpus*. Formal judgment rendered by

LAURENDEAU, J. (translated) :—Whereas the defendants by their petition allege that they are at the present time detained in the common jail in Montreal illegally, because their arrest was effected during the night in a cellar bearing the No. 82 Amherst street in Montreal, when the constables who arrested them were not provided with search warrants or warrants of arrest in accordance with the provisions of art. 3982*g* of the Act 1 Geo. V. (2nd session) ch. 35 (Que.) ; because as the arrest was illegal the recorder who heard the case and who convicted them had no jurisdiction ; because the recorder who heard the case and convicted the petitioners did not draw up or sign the conviction in accordance with Form 32 (Criminal Code, 1906) on the 29th November last, and such convictions or orders have not yet been signed ; that in consequence of this default to sign the convictions or orders the petitioners have been deprived of their right of appeal ; that a warrant of commitment must be based upon a conviction and cannot be issued before such conviction has been drawn up or signed ; that the warrant of commitment does not mention that the petitioners have been convicted as required by Form 41 of the Criminal Code, and they ask that they be given their liberty ;

Considering that art. 3982*g* of the Act 1 Geo. V. (2nd session), ch. 35 (Que.), does not require a warrant for the arrest of an individual who is committing or who has committed an offence against this Act, but that this article only makes a warrant necessary in order to authorize a constable to search in a place named whether there are any substances, compounds or preparations therein of the kind enumerated in the said Act and to effect their seizure and production before the Judge or magistrate who has issued the warrant or any other Judge, magistrate or justice of the peace ;

Considering that the petitioners were arrested without a war-

rant, brought before the recorder, pleaded not guilty, but were found guilty, and convicted by the said recorder;

Considering that if such a warrant was necessary to effect the petitioners' arrest these latter never complained of the matter and it is now too late to complain of it, and this illegality, if it exists, cannot give rise to a writ of *habeas corpus*;

Considering that if such illegality existed it did not deprive the recorder of the jurisdiction which the law gave him to hear and decide the said cases;

Considering that according to the provisions of the Criminal Code, which apply under the circumstances, the recorder was not obliged to draw up and sign the order of condemnation or conviction immediately, and it was sufficient for him to make, as he did, a memorandum of such order or conviction upon the record; that the warrant of commitment can be based, as was the case, upon this memorandum and the conviction which was drawn up and signed after the service of the present petition was so drawn up and signed within due time;

Considering that the conviction consists in the pronouncement of the sentence by the recorder or magistrate; that the note or memorandum written upon the record is only a proof of this conviction, the drawing up is only the putting of the conviction into proper form, and the conviction which is so drawn up must bear the date on which the conviction was pronounced, although it was drawn up and signed at a later date; ,

Considering that the word "convicted," which occurs in Form 41 (Criminal Code), relating to the warrant of commitment and that the words "declared guilty" in the warrant of commitment in this case are sufficient;

Considering that the fact that the conviction was only drawn up and signed on the 21st December, 1911, has not deprived the petitioners of their right of appeal which could be exercised immediately after the sentence was pronounced;

Considering the petition of the petitioners is ill founded;

Doth dismiss the said petition and quash and annul the writ of *habeas corpus* issued in this case, the whole with costs.

Discharge refused.

Leopold Houle, attorney for the petitioners.

Ethier, Archambault, Lavallée, Damphousse, Jarry & Butler,
attorneys for the *mis-en-cause*.

[COURT OF KING'S BENCH, QUEBEC.]

(Appeal Side.)

BEFORE TRENHOLME, LAVERGNE, CROSS, ARCHAMBEAULT, AND
CARROLL, JJ.

PLANTE v. CLICHE (No. 2).

1. SUMMARY CONVICTIONS (§ III—30)—QUEBEC LICENSE LAW—ADJOURNMENT AND DELAY FOR RENDERING JUDGMENT—SEC. 722, CRIMINAL CODE, 1906.

In proceedings under Part XV. Criminal Code (summary convictions) the sentence or judgment does not form part of the hearing and consequently the limit of eight days for adjournment provided by section 722 of the Criminal Code, 1906, or thirty days under the Quebec license law, art. 1117, R.S.Q. 1909, does not apply to the delay which may elapse after the hearing is finished and before judgment is rendered.

[*Plante v. Cliche*, 17 Can. Cr. Cas. 43, affirmed on appeal.]

2. SUMMARY CONVICTIONS (§ III—30)—FIXING DATE FOR JUDGMENT.

The justice is not obliged to fix a date in writing at the conclusion of the hearing for the rendering of judgment, but may render judgment when ready upon giving notice to the parties.

3. INTOXICATING LIQUORS (§ III K—94)—THIRD OFFENCE—DISCRETION AS TO PENALTY.

Under section 1009, R.S.Q. 1909, the power to inflict imprisonment without option of a fine for a third offence under the Quebec license law is in the discretion of the court and the complaint is sufficient if it simply asks for the imposition of a fine and not for imprisonment.

[*Plante v. Cliche* (No. 1), 17 Can. Cr. Cas. 43, affirmed on appeal.]

DECIDED: June 28, 1911.

The judgment which is appealed from and which is confirmed is reported *Plante v. Cliche*, 17 Can. Cr. Cas. 43, 38 Que. S.C. 535.

QUEBEC, June 28, 1911.

ARCHAMBEAULT, J. (translated) :—This is a judgment quashing a writ of prohibition, the purpose of which was to set aside a conviction which was pronounced against the appellant for the illegal sale of spirituous liquors. The grounds invoked by the appellant in opposition to the conviction are three: (1) The magistrate did not adjourn the case to a fixed date in order to render judgment; (2) the magistrate rendered judgment more than thirty days after the conclusion of the trial; (3) the appellant has been condemned to six months' imprisonment, when the complaint simply asked for the imposition of a fine of \$350.

As to the first ground it is proved that after the trial was finished on the 1st of June the magistrate fixed the first day of the following term for the rendering of his decision. This proof is made by the clerk of the Court, Mr. Joseph Ferron, and by Messrs. Pierre Bouffard and Gustave Hamel, both lawyers, who were present in Court when the day for the judgment was so fixed. The magistrate said:—

I will render judgment next week and I will notify the parties; or if not I will render judgment on the first day of the next term or the first Wednesday of next month,

which is the same thing, for the first Wednesday of July was the first day of the then next term. I see, moreover, at the end of the deposition of Mr. Auguste Pacaud, one of the appellant's attorneys, who was heard as a witness, a declaration that a letter from Magistrate Angers would be fyled in the record to avail as his evidence. This letter then was fyled "to serve as evidence by consent of the parties"; it reads as follows:—

After having heard the very important and elaborate evidence of Mr. Pacaud for the defence, and the addresses, I declared that I would take the case under advisement and that I continued it for judgment until the first day of the then next term of the Court over which I was presiding; but I added that in view of the interests at stake and the wish of the revenue department to have a decision as soon as possible I would render judgment before the date fixed upon giving notice to the parties if it were possible for me to do so. These are the facts which I would have substantiated under oath, if I had been able to go to St. Joseph at the time of the trial of the present case.

The appellant pretends that the magistrate could not verbally fix the day for rendering judgment in this way and he objected to the proof by testimony which was made in this respect.

I find nothing in the law which obliges the magistrate to fix the date of judgment in writing. What is necessary is that the parties should be notified that judgment will be rendered on a certain date so that they can be present and avail themselves of their rights and recourse if necessary. Here the parties were present or represented when the date of judgment was fixed and they were also present or represented when the judgment was rendered on the 6th July, which was the date set by the magistrate. The appellant's first ground is, therefore, ill founded.

In the second place the appellant pretends that the magistrate should render his judgment within thirty days of the conclusion of the trial, and that as it was rendered on the 6th of July, thirty-six days after the hearing of the case, the judgment is null, as the magistrate had become *functus officio*.

The Quebec license law declares that prosecutions taken under its provisions shall be subject to the provisions of Part XV. of the Criminal Code. This part of the Criminal Code relates to summary convictions. Section 722, which is included in this part, reads as follows:—

Before or during the hearing of any information or complaint the justice may in his discretion adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective counsels, solicitors or agents then present, but no such adjournment shall be for more than eight days.

Article 1117 R.S.Q. 1909, which, as I have just said, makes prosecutions under the Quebec license law subject to the provisions of the Criminal Code regarding summary convictions, makes, however, a change in the provisions of sec. 722 of the Criminal Code by replacing the words, "but no such adjournment shall be for more than eight days," by the words, "but no adjournment shall be for more than thirty days." Section 722 of

the Criminal Code as altered, amounts to saying that in prosecutions taken under the Quebec license law the justice of the peace may either before or during the hearing of the complaint adjourn the hearing of the matter to any day, provided this adjournment is not for more than thirty days. The appellant invokes this provision of the Revised Statutes of Quebec, 1909, in support of his contention that the conviction in the present case is void because the magistrate pronounced it more than thirty days after the hearing of the case. I am of opinion, with the Judge of first instance, that this provision of the Criminal Code applies to adjournments which may take place during the trial or hearing of the case, but that it does not apply to the fixing of a day for the rendering of judgment when the hearing is finished. The sentence or judgment does not form part of the hearing. We have no provision in our laws which obliges Judges to render judgment within a fixed delay. A declaration to the effect that no adjournment before or during the hearing of the case can be for more than eight days, or thirty days, cannot affect the right of a Judge or Court to deliberate for as long as engagements or the difficulties of the case may render necessary in order to give a decision which is equitable and in conformity with the law.

The appellant's third grievance is that he was condemned to six months' imprisonment when the complaint simply asked for the imposition of a fine of \$350. The complaint sets forth that the offender (the appellant) is prosecuted for a third offence. The license law (art. 1009, R.S.Q. 1909) provides that for a third and every subsequent offence the delinquent is liable to a fine of not less than \$250 nor more than \$350, and in default of payment to imprisonment for six months, or in the discretion of the Court to imprisonment for six months without the option of a fine. The discretionary power as to imprisonment without option of a fine is here given to the Judge. The law practically says that when the revenue inspector complains of the commission of the third offence by an offender and asks for the imposition of a penalty of \$350, the Judge may, in his discretion, instead of

imposing this penalty, condemn the offender to six months' imprisonment. It is the law which gives the Judge this discretionary power. It is not necessary that the prosecutor should ask for the exercise of it in his complaint. In fact he ought not to ask for it. Thus the form which is annexed to the Act in connection with this offence does not speak of imprisonment (Form F). The conclusions there set up are simply "that he (the defendant) may be condemned to pay the sum of dollars for the said offence with costs."

I am consequently of the opinion that the third ground which is invoked by the appellant against the judgment *a quo* is equally ill founded as the first two.

Another reason which is set forth by the Judge of first instance in his notes of judgment and which I find sufficient to repulse the appellant's demand is that the law which governs the present case provides in art. 1166 that the Court before which a demand of *certiorari* or prohibition is made in such cases shall not take into account any defect in form or substance provided it appear by the conviction that the condemnation was made for an offence against some provision of the law by a justice of the peace or magistrate within the limits of his jurisdiction and provided it further appear from such conviction that the appropriate penalty or punishment for such an offence was intended to be thereby adjudged.

In the present case there is no doubt the condemnation was pronounced for an offence committed against the license law, that the magistrate acted within the limits of his jurisdiction and that he intended to inflict and has in fact inflicted a punishment which is appropriate to the offence which the delinquent has committed.

For these reasons I am of opinion that the judgment *a quo* should be confirmed.

Appeal dismissed.

Pacaud & Morin, for the appellant; *L. N. Talbot*, counsel.
J. H. Fortier, for the respondent.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE LAURENDEAU, J.

THE KING v. GOULET.

1. CRIMINAL LAW (§ II A—31)—PRELIMINARY ENQUIRIES—REMAND FOR MORE THAN THREE CLEAR DAYS.

Where a preliminary enquiry is being held and the prisoner is orally remanded for a time exceeding three clear days, the justice exceeds his jurisdiction, as a warrant of remand is required under Criminal Code sec. 679, where the remand is for more than three days.

[*The Queen v. Holley*, 4 Can. Cr. Cas. 510; *Re Sarault*, 9 Can. Cr. Cas. 448, referred to.]

DECIDED: August 19, 1911.

The accused, Alfred Goulet, had been arrested on the 7th of August on the charge of burglary up to the amount of \$750, belonging to persons unknown, in connivance with a woman of the name of Blanche Lagacé. Subsequently he was accused of three other burglaries and of carrying away furs, silverwares, etc., to the approximate amount of \$7,000.

Arraigned before Magistrate H. Lanctet, he admitted a couple of these offences, and denied the others. At the request of detective Charpentier and Sergeant Gagnon, the said magistrate committed the prisoner to their custody, and since then he had been kept in close confinement at the police headquarters, at the City Hall, during 8 days.

L. Houle, acting on behalf of the prisoner, contended that this detention was illegal; that in keeping his client in close confinement elsewhere than at the gaol he could not be advised and that his advocate was unable to defend him. That the duty of the magistrate consisted of remanding the prisoner to the common gaol by warrant of commitment according to form 17 of the Criminal Code (1906), art. 679(c).

Even if the prisoner had consented to this mode of imprisonment, his detention is void even so, because in criminal law the consent cannot give jurisdiction. *R. v. Smith*, 3 Can. Cr. Cas. 467.

If the remand exceeds three days, it must be made by warrant of commitment. *R. v. Holley*, 4 Can. Cr. Cas. 510; *Re Sarault*, 9 Can. Cr. Cas. 448.

J. C. Walsh, K.C., for the respondent.

LAURENDEAU, J.:—The respondents have not proved sufficient cause for the detention by them made of the accused, the magistrate having without written warrant ordered his detention for more than three days. The writ of *habeas corpus* is maintained and an order made for the release of the accused, without costs.

Order for discharge.

[SUPREME COURT OF ALBERTA.]

BEFORE WALSH, J.

THE KING v. ROGER HICKS.

1. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—POWER OF JUSTICES TO COMMIT FOR TRIAL.

Under the Criminal Code it is not competent for a magistrate who is holding a summary trial after hearing all the evidence on both sides to decide to commit for trial instead of disposing of the case himself; the right to commit for trial being limited as to time by the terms of Cr. Code, sec. 786, directing that the magistrate may "before the accused person has made his defence" decide not to adjudicate summarily upon the case.

2. HABEAS CORPUS (§ I C—12a)—COMMITMENT FOR TRIAL—ILLEGALITY—RIGHT TO DISCHARGE.

The fact that a warrant of committal for trial was illegally issued on a charge of assault and occasioning actual bodily harm after the justices before whom the accused had been brought to answer the charge had with his consent entered upon a summary trial thereof, which trial had proceeded to the close of the evidence for the defence, is a ground for discharge upon *habeas corpus*.

3. HABEAS CORPUS (§ I C—12a)—DISCHARGE OF PRISONER—REMITTER TO MAGISTRATE—DISCRETION.

Where the court has power upon *habeas corpus* instead of discharging a prisoner from custody under an invalid commitment to remit the case to the magistrate under section 1120 of the Criminal Code (1906), consideration will be given to the imprisonment already suffered and to the costs to which the accused has been put in moving against the illegal warrant of commitment.

DECIDED: October 15, 1912.

AN application on behalf of the prisoner for a writ of *habeas corpus*, or for his discharge from custody.

An order discharging the prisoner was made.

A. McDonald, for prisoner.

L. F. Clarry, for Crown.

WALSH, J.:—The accused, who is confined in the guard room at Fort Saskatchewan, under a warrant of commitment issued by a justice of the peace, applies for a writ of *habeas corpus* or for his discharge from custody without the actual issue of the writ. He was summoned before this justice upon a charge of having assaulted his wife and occasioned actual bodily harm to her. At the conclusion of the proceedings, which were carried on before two justices, he was committed for trial at the next Court of competent jurisdiction and it is under this commitment that he is now in custody.

The ground upon which his application is based is that the justices with his consent undertook to summarily try him upon this charge but that after he had made his defence before them, they refused to dispose of the charge summarily and instead committed him for trial.

Sec. 784 provides that under certain circumstances the magistrate may “before the accused person has made his defence decide not to adjudicate summarily upon the case.” This is the only provision which entitles a magistrate who has undertaken to summarily try a person charged before him, to refuse to do so. The right so given can be exercised only in the terms of the section which confers it. It is therefore not competent for a magistrate who is holding a summary trial after hearing all of the evidence on both sides to decide to commit for trial instead of disposing of the case himself. After the accused has made his defence the magistrate is the only tribunal clothed with power to try the charge and he must dispose of it.

Upon the material before me I have no doubt whatever but that upon the hearing before the justices the accused consented to a summary trial and that the justices undertook to so try him

and that the trial proceeded upon that understanding until all of the evidence on both sides was before them and that it was then and not until then that they decided to commit instead of disposing of the case themselves. And so finding, it follows that the justices erred in committing the accused for trial and that he is wrongfully detained in custody under the warrant. Mr. Clarry asked me in the event of my conclusion being as above, not to order the discharge of the accused but instead to remit the matter to the justices under sec. 1120 of the Code so that they might do what they should have done in the first place, namely either dismiss the charge or impose upon the accused the punishment which in their opinion should be meted out to him. I have not considered with any degree of care the question as to whether or not the aid of this section can be invoked by the Crown in such a case as this, for I think, that even if it can, it should not be under the circumstances here present. This section authorizes me to do such act, as in my opinion, "may best further the ends of justice." I think that the ends of justice have been fairly well served by the punishment which this man has already undergone. By the time that this order can be acted upon he will have been imprisoned for very nearly a month and he will have paid a considerable sum for his costs of defence and of this application which may be looked upon perhaps as somewhat in the nature of a fine. The maximum penalty fixed for this offence under sec. 781 is six months' imprisonment and a fine of \$100. It is true that the assault upon his wife was of a violent character. In giving his own evidence, however, the accused was most frank and candid in his admissions of wrong-doing so far as this particular charge is concerned. One cannot read his evidence without a strong feeling of pity for the man, for it is apparent from it, if he is telling the truth, that he is the victim of an ungovernable temper which is hereditary with him and which is responsible for the events which led up to this prosecution. I understood from what was said in argument and I gather from something that appears in the material used before me, that since the hearing his wife has gone to England to live, her

departure doubtless being the result of this assault. In addition therefore to the imprisonment which he has undergone, and the expense to which he has been put to he is under the further punishment of having driven his wife from him. While it is quite true that a longer term of imprisonment and a heavier fine might without injustice have been imposed upon him, I think that I "may best further the ends of justice" by ordering his discharge, which I do. The order will contain a clause protecting from liability the justices and all persons who have acted under the warrant.

Order discharging prisoner.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE GARROW, MACLAREN, MEREDITH, AND MAGEE, JJ.A., AND
LENNOX, J.

DUNN v. GIBSON.

1. EVIDENCE (§ XII A—920)—SUFFICIENCY—CORROBORATION — RAPE — CIVIL ACTION—RULES OF CRIMINAL EVIDENCE NOT WHOLLY APPLICABLE.

The rules of evidence applicable to a criminal prosecution requiring corroboration of the testimony of the complaining witness as to the fact of rape and requiring disclosure by her of the alleged act, do not apply to a civil action for damages for assaulting and ravishing the plaintiff without her consent.

2. DAMAGES (§ III E—142a)—SEDUCTION—UNBORN CHILD—RAPE—MEASURE OF DAMAGES.

Where, in an action to recover damages for assaulting and ravishing plaintiff without her consent, the plaintiff's counsel, without objection, was allowed to urge upon the jury large damages on account of the expense plaintiff would be put to for the bringing up of a then unborn infant, while as a matter of fact the infant when born lived only a day, a new trial will not be granted, since the jury must have had in mind the possible contingency of an early death.

3. DAMAGES (§ III E—142a)—SEDUCTION, MEASURE OF DAMAGES FOR—CIVIL ACTION FOR RAPE.

A new trial will not be granted where the trial jury awarded \$5,000 damages to the plaintiff in an action for damages for assaulting and ravishing plaintiff without her consent, on the ground of excessive damages, where by reason of the outrage plaintiff became pregnant.

DECIDED: November 19, 1912.

APPEAL by the defendant from the judgment of a Divisional Court, dismissing an appeal from SUTHERLAND, J., in an action tried before him with a jury, for damages for assaulting and ravishing the plaintiff without her consent. The jury awarded \$5,000 damages, and the verdict was affirmed by the Divisional Court.

The appeal was dismissed.

E. F. B. Johnston, K.C., for the defendant.

W. A. Logie, for the plaintiff.

TORONTO, December 19, 1912.

MACLAREN, J.A.:—The plaintiff a young woman of 22 years of age was a servant in the house of the defendant's mother, a grand-daughter being the third member of the family. The defendant, who is about forty years of age and unmarried, lived with a relative near by. He was in the habit of going to his mother's frequently, and bringing in water and doing other chores. From an accident in childhood his mentality was arrested, and he could not be taught, but he developed physically. He was examined for discovery, and as a witness sometimes he answered intelligently and at other times not, but nearly always in monosyllables. He denied the charge. Plaintiff said the offence was committed in the morning when he and she were alone in the house. She said she screamed but was not heard. She did not tell any person about it until nearly two months after the alleged outrage when she went to the hospital and her pregnancy was discovered.

Counsel for the appellant argued that the action should fail because her testimony required corroboration, and because there was no disclosure by her for nearly two months. This is not a criminal case, and the rules of evidence in the Criminal Code on these points do not apply, and these were questions for the jury.

It was also claimed for the appellant that the trial Judge improperly allowed the plaintiff's counsel to urge upon the jury

large damages on account of the expense she would be put to for the bringing up of the then unborn infant, whereas in the result it lived only one day. The defendant's counsel did not raise any objection at the trial, and there is nothing to shew that any improper appeal was made. The possible early death of the child was a contingency that would be present to the minds of the jury, and the actual result could be no ground for a new trial.

A new trial was also claimed on the ground of excessive damages. The damages are much larger than are ordinarily allowed in such cases; but this is a matter peculiarly for the jury. The offence was a very grievous one, if the evidence of the plaintiff was true, and the jury believed her. The Divisional Court were evidently not shocked by the amount, and I do not think it is a case in which we can properly interfere.

In my opinion the appeal should be dismissed.

GARROW, J.A., MAGEE, J.A., and LENNOX, J., concurred.

MEREDITH, J.A., concurred in the result.

Appeal dismissed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE GARROW, MACLAREN, MEREDITH, AND MAGEE, J.J.A., AND
LENNOX, J.

THE KING v. MURRAY AND FAIRBAIRN.

1. NEW TRIAL (§ II—7)—CONVICTION OF ONE OF TWO DEFENDANTS AGAINST
WEIGHT OF EVIDENCE—JOINT CONVICTION.

That the conviction of one of two defendants tried jointly for burglary and theft was against the weight of evidence is no reason for granting a new trial to both under sec. 1021 of the Criminal Code; but the rule is otherwise if the defendants have been jointly convicted of conspiracy, or if a new trial will tend to the administration of justice.

[*R. v. Fellowes*, 19 U.C.Q.B. 48, distinguished.]

2. DEFINITIONS (§ I—1)—MEANING OF "VERDICT."

The word "verdict" in sec. 1021 of the Criminal Code is confined to the findings of a jury.

DECIDED: November 19, 1912.

MOTION by the defendants, on consent of the Junior County Judge of Middlesex, who tried the case, under sec. 1021 of the Code, for a new trial.

A new trial was granted the defendant Fairbairn.

J. R. Cartwright, K.C., for the Crown.

P. H. Bartlett, for the defendants.

MACLAREN, J.A.:—The two appellants were tried together in the county Judge's Criminal Court at London before the Junior Judge, for burglary and theft, and were both convicted. He granted them leave under section 1021 of the Criminal Code to appeal to this Court for a new trial on the ground that the verdict was against the weight of evidence.

It was strongly argued on their behalf before us that if the conviction of either of the accused was against the weight of evidence, they should both have a new trial, and a dictum of Robinson, C.J., in *Regina v. Fellowes*, 19 U.C.Q.B. 48, 54, was cited in support of this proposition. It is to be observed, however, that that was a case of conspiracy, as was also *Regina v. Gompertz*. 9 Q.B. 824, where Lord Denman, C.J., laid down the same rule. No authority was cited to us, nor have I found any for such a rule in a case of burglary like the present. If this had been a case of conspiracy it would have necessarily been applicable to them both. In my opinion the general rule is that laid down by Lord Kenyon, C.J., in *Rex v. Mawbey*, 6 T.R. 619 (also a case of conspiracy), at 638, where he says that the Courts will grant or refuse a new trial according as it will tend to the advancement of justice. I do not find anything in the law or in the facts of the present case to prevent the cases of these two appellants being considered separately, each on its own merits, and if the evidence warrants it, different conclusions being arrived at.

According to the evidence the Arva Mill, a short distance north of London, was broken into on the night of March 27th, 1912, the safe blown open and two small cheques and \$178.15 in cash stolen. The empty cash-box was found in a field close to

the road leading to London. Fairbairn gave evidence and said he was a pedler who had sold out his stock in Sarnia and Watford, and had beaten his way to London on a freight train arriving on Monday, March 26th, and that he slept in a barn in London West on Tuesday night, got two cups of tea at the house of the owner about 9 on Wednesday morning, having his own bread; that he met Murray for the first time in the public library; and that they were drinking in different hotels. When arrested on Wednesday afternoon he had \$3.86 on his person. His story about his breakfast was corroborated and he was seen about 9 o'clock on his way to the city alone. The two prisoners were seen together several times during the day at hotels, a barber shop, etc. At one of the hotels Fairbairn put his hand into Murray's pocket and took out \$115 in bills which were taken from him and delivered to the landlady for safekeeping. When arrested late in the afternoon Murray had \$17 additional in bills and \$22.42 in silver and coppers. When on his way to the police station he said several times that he had \$18 when he came to London, but he was in a drunken condition when he said it. The denominations of the bills and the silver corresponded generally with that taken from the cash-box, but none of it was identified except two silver coins—one a ten cent. piece worn smooth, with a very small hole near the edge, and an English threepenny piece, both of which had lain in the mill cash-box for some weeks. Murray did not go into the witness-box nor produce any evidence as to where he had come from, or where he had got these two coins or any of the money, and there was no evidence of his having been in London until the day after the robbery. In my opinion he has made out no case for a new trial, and I think his appeal ought to be dismissed.

As to Fairbairn there is no evidence that the \$3.86 found on him formed part of the money stolen, nor is there any evidence that he had ever seen Murray until the forenoon of the day after the burglary. It is difficult to accept his story as to his doings on the day in question, as a considerable part of it is

inconsistent with the evidence of the other witnesses, but that may be due in part to the drunken condition in which he then was. He appears to have suffered a prejudice from his familiarity with Murray during the day after the burglary. No special reasons have been given for the granting of the leave to appeal, but it is probably on account of the weakness of the evidence against Fairbairn. On the whole, I am of opinion that a new trial should be granted to Fairbairn alone.

I am aware that in entertaining the appeal in this case we are giving to the word "verdict" in section 1021 of the Code a meaning that it does not usually bear. While the general dictionaries, both English and American, mention its use in the popular or philological sense as when one speaks of "the verdict of the people," yet they all, so far as I have seen, confine its legal meaning to the findings of a jury. The same may be said of the English Law Dictionaries, and also of the American so far as I know, except that of Rapalje & Lawrence, which defines it as "the opinion of a jury or of a Judge sitting as a jury on a question of fact." This last definition has been approved in *Carlyle v. Carlyle*, 31 Ill. App. 338. On the other hand some of the American Law Dictionaries not only define the word as the finding of a jury, but add that it is inapplicable to the findings of a Judge. Black's Law Dictionary says, "It never means the decision of a Court or a Referee or a Commissioner;" and Abbott's says, "The decision of a Judge or referee upon an issue of fact is not called a verdict, but a finding, or a finding of fact." In *Bearce v. Bowker*, 115 Mass. 129, Gray, C.J., says, "None but a jury can render a verdict"; similar language is used in *Otis v. Spencer*, 8 How. Pr. (N.Y.) 172; *Kerner v. Petigo*, 25 Kan. 652; *McCullagh v. Allen*, 10 Kan. 154; and *Froman v. Patterson*, 24 Pac. Rep. 692.

I do not know of any English statute in which the word has any other meaning than the finding of a jury, nor any Canadian statute where it can be otherwise construed, unless it be in this sec. 1021 of the Code, which we are now considering. Nor am I aware of its being used in any other sense by any English

or Canadian Judge or legal writer except by the Master of the Rolls (Jessel), in *Krehl v. Burrell*, 10 Ch.D. 420, where in a case tried by him without a jury he says, "I give a verdict to the plaintiff, and reserve my judgment for a fortnight." This was said thirty-five years ago, but such use of the word does not appear to have been followed unless it be in the section which we are now construing (possibly because Jessel was more distinguished for his legal acumen than for his exact scholarship). It would have been much more satisfactory if Parliament used unambiguous words that could not have given rise to the present difficulty. A further argument in favour of confining it to the verdict of a jury might be that in a case in which a Judge had sufficient doubts to justify him in allowing an appeal, he would ordinarily give the benefit of the doubt to the accused and not convict him. However, as this point was taken by the Crown, we do not now pass upon it, but reserve the right to do so hereafter in case Parliament should not see fit to change the language of the section, and it should come before us for decision.

LENNOX, J.:—I agree.

GARROW, MEREDITH, and MAGEE, JJ.A., also concurred in the result.

New trial ordered.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE KELLY, J., IN CHAMBERS.

THE KING v. COOK.

1. INTOXICATING LIQUORS (§ III E—78)—SALES TO INTEMPERATE
"PUBLIC PLACE" DEFINED.

An hotel is not a "public place" within the meaning of 2 Geo. V. ch. 55, amending the Liquor License Act (Ontario).
"public place" must be a street, square, park or other of the kind.
[*Case v. Story*, L.R. 4 Ex. 319, referred to.]

DECIDED: November 25, 1912.

MOTION by the defendant for an order quashing a conviction for being found upon a street and in a public place, in an intoxicated condition owing to the drinking of liquor in a municipality in which what is known as a local option by-law was in force.

The conviction was quashed.

J. Haverson, K.C., for the defendant.

Colin S. Cameron, for the magistrates.

KELLY, J.:—Two of the grounds relied upon in support of the motion are: (1) that the information shews no offence under the statute, and, (2) that the accused was not found in an intoxicated condition upon a street or in a public place.

The form of information as returned is that the accused "between June 30th and July 30th, 1912, at Lions Head did unlawfully, was intoxicated contrary to the provisions of the Liquor License Act, upon a street or in a public place in the Township of Eastnor." It bears upon its face evidence of having been amended, and it is clear that as first drawn it read, "was intoxicated contrary to section eighty-six of the Liquor License Act," and that the amendment made was by striking out the words "section eighty-six" and substituting therefor the words "the provisions," and by adding after the words "Liquor License Act," the words, "upon a street or in a public place in the Township of Eastnor."

From the appearance of the document the conclusion might be reached that the amendment was made after the accused had pleaded "not guilty." If the only objection to the conviction were that it does not shew an offence, I should feel disposed to quash the conviction on that ground; but I do not rest my judgment upon that, but on the other ground mentioned.

Three different forms of conviction have been returned, one being "that said John H. Cook was intoxicated on a street and in a public place in the Township of Eastnor on July 8th, 1912," another: "That said defendant did get intoxicated in the Williams hotel in the Township of Eastnor on July 8th, 1912," and

the third: "That the said J. H. Cook on the 8th day of July, 1912, in the Township of Eastnor in the county of Bruce was found upon a street and in a public place at Lions Head in the Township of Eastnor in the said county in an intoxicated condition owing to the drinking of liquor contrary to the Ontario Liquor License Act and amendments thereto, there being then in force in the municipality of the township of Eastnor a by-law passed by the municipality of Eastnor under section 141 of the Liquor License Act commonly known as the local option by-law."

While there is quite sufficient evidence that the accused was intoxicated, there is no evidence that he was found intoxicated on a street or in a public place, unless effect be given to the contention set up on behalf of the magistrates that the Williams hotel in Lions Head, in which the accused was intoxicated, is a public place.

The intention of the amendment to the Liquor License Act made in 1912, 2 Geo. V. ch. 55, sec. 13, was to protect the public from being met by the sight of intoxicated persons on streets, and in public places of a character similar to streets, where the public generally have a right to be; and in making use of the words "any public place," it was no doubt intended that it should apply to a place ejusdem generis with a street, and not to a place such as the hotel in question.

The words used in the judgment of the Divisional Court in *Regina v. Bell*, 25 O.R. 272 (at p. 273), are apt to this case, viz.: "To be within its provisions an offence must have been committed in a public place such as a street, square, park or other open place." Another case which is strikingly like the present one is *Case v. Story*, L.R. 4 Ex. 319. That was a case where a hackney carriage driver, standing on the premises of a railway company by their leave, for the purpose of accommodating passengers by their trains, was requested by a party to drive him, and refused; and it was contended that he was bound to do so under the statute which provides that every carriage which shall be used for the purpose of standing or plying for hire

in any public street or road in any place within a distance of five miles from the general Post Office in the City of London shall be obliged and compellable to go with any person desirous of hiring such hackney carriage.

Kelly, C.B., in his judgment, at page 323, says: "We have to consider the subsequent words of the definition 'in a public street or road.' It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public resort, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are, nevertheless, private, and in no possible manner capable of being described as public streets or roads." And at page 324, when referring to the contention of counsel that "place" is a large term, he says: "We must take it as only meaning a place ejusdem generis with a street."

A perusal of the report of *Curtis v. Embrey* (1872), L.R. 7 Ex. 369, is helpful in arriving at the meaning to be given to "a public place." There Bramwell, B., in defining the meaning of "road" which was referred to in the statute then under consideration, and which was used in giving the interpretation of the word "street" used in that statute, said that it "must be a road over which the public have rights."

"Public place" in section 13 above, especially when taken in connection with the word "street" which precedes it, must mean a place over which the public have rights as over a street, and not a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

I am unable to agree with the contentions set up that the hallway and rooms of the hotel, where alone the accused was found intoxicated at the time in question, is a public place within the meaning and intention of section 13 of the amending Act, and

the conviction on that ground alone, apart from any others, must be quashed with costs.

Though giving protection to the magistrates, I must draw attention to the loose and unsatisfactory manner in which the papers in this case, such as the information and conviction and amended convictions, were prepared.

Conviction quashed.

[COURT OF APPEAL FOR MANITOBA.]

BEFORE RICHARDS, PERDUE, CAMERON, AND HAGGART, J.J.A.

ZDRAHAL v. SHATNEY.

1. APPEAL (§ VII M 3a—550)—FACTS OTHERWISE PROVED—OBJECTION TO ADMISSIBILITY OF DISCOVERY DEPOSITIONS.

Where the defendant in a criminal conversation case was examined for discovery before the trial without objecting to testify on the ground of privilege, and where he testified in his own defence at the trial and upon cross-examination repeated substantially everything included in the discovery depositions an objection taken on appeal against the verdict on the ground that the depositions on discovery were put in evidence at the trial by the plaintiff against the defendant's objection founded on the statute 32-33 Vict. (Imp.) ch. 68, sec. 3, will not be allowed.

[*Fleury v. Campbell*, 18 P.R. (Ont.) 110, referred to.]

2. MARRIAGE (§ I—2)—MARRIAGE ACT (MAN.)—VALIDATION OF MARRIAGES INCLUDES PERSONS MARRIED IN FOREIGN LANDS—MANITOBA MARRIAGE ACT.

The provisions of the Manitoba Marriage Act validating (under the limitations of that section) all marriages after two years between persons not under legal disqualification notwithstanding irregularities, "so far as respects the civil rights in Manitoba of the parties or their issue, and in respect of all matters within the jurisdiction of the legislature of Manitoba," apply to persons whether married within the Province or in foreign countries. (*Per Haggart, J.A.*)

[Sec. 30 of Marriage Act, 5 & 6 Edw. VII. (Man.) ch. 41, construed.]

3. HUSBAND AND WIFE (§ III A—144)—CRIM. CON.—PROOF OF ACTUAL MARRIAGE BEYOND EVIDENCE OF COHABITATION AND REPUTATION.

In a criminal conversation action there need not be evidence of the validity of the marriage ceremony, but there must be strong evidence of the marriage itself going beyond mere evidence of cohabitation and reputation, and the best proof that could be given of an actual marriage is by some person actually present at the solemnity.

[*Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 171, 174; *Wigmore on Evidence*, sec. 2084; *Catherwood v. Caslon* (1844), 13 M. & W. 261, 13 L.J. Ex. 334; *R. v. Millis*, 10 Cl. & F. 534; *Beamish*

v. *Beamish*, 9 H.L.C. 274, 337; *Mainwaring's case*, 1 Dear. & B. 139; *R. v. Griffin*, 4 L.R. Irish 497, 503, 14 Cox C.C. 308; *Morris v. Miller*, 1 W. Bl. 632, referred to.]

4. EVIDENCE (§ XII F—952)—PROOF OF MARRIAGE BY EYE-WITNESS.

The fact of a marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed.

5. EVIDENCE (§ XII F—952)—PROOF OF MARRIAGE—TESTIMONY OF CONTRACTING PARTY.

In an action for criminal conversation, where evidence of a marriage can be proved by an eye-witness, in a jurisdiction wherein the old common law disqualification has been removed and a party to the action is therefore a competent witness; the husband himself is one of the best eye-witnesses and is competent.

[*Morris v. Miller* (1767), 4 Burr. 2057; *Birt v. Barlow* (1779), 1 Doug. 171 (decided long prior to ch. 68 of 32 & 33 Vict. (Imp.) (1869), qualifying the husband), distinguished.]

6. EVIDENCE (§ VII H—632)—PROOF OF FOREIGN MARRIAGE—ADMISSION OF DEFENDANT IN CRIM. CON. CASE—FOREIGN MARRIAGE LAW.

In an action for criminal conversation, the admission of the defendant, that he knew the plaintiff to be married, coupled with the affirmative testimony of those present at the ceremony, is evidence of the marriage, though it took place in a foreign country, but it is not sufficient to prove the foreign marriage law.

[*Rez v. Naoum* (1911), 19 Can. Cr. Cas. 102, 24 O.L.R. 306; *R. v. Creamer*, 10 L.C.R. 404, 450n, referred to.]

7. EVIDENCE (§ II E 2—151)—PRESUMPTION—DE FACTO MARRIAGE.

A cogent legal presumption is raised in favour of any marriage which is shewn to be celebrated *de facto*, and this presumption of law is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

[Taylor on Evidence, 10th ed., par. 172, referred to.]

DECIDED: November 4, 1912.

THIS action is brought to recover damages for criminal conversation by the defendant with the plaintiff's alleged wife. The action was tried before Mr. Justice Macdonald. He allowed the case to go to the jury and they gave a verdict for the plaintiff. The defendant has moved to set aside the verdict and enter a nonsuit on the ground that the evidence did not establish, to the extent required in a case like this, that the woman in question was the plaintiff's wife.

The appeal was dismissed, the Court being equally divided.

N. F. Hagel, K.C., for the plaintiff.

E. L. Howell, for the defendant.

RICHARDS, J.A.:—The evidence shewed that the plaintiff and the woman had lived together, as man and wife, in this country. The plaintiff swore that he had been married to her in Hungary, apparently by the rites of the Roman Catholic church. He did not pretend to have any knowledge of the laws of Hungary, or to be, in any way, qualified to say whether the marriage was a legal one. The effect of his evidence is merely this, as I take it, that he went through a ceremony which he believed made himself and the woman man and wife.

There was also produced to the Court, although apparently not filed as an exhibit, according to the registrar's entries in his book, a document in the Hungarian language. A witness was called who spoke both Hungarian and English, who apparently stated its effect to the Court. There is no translation of it amongst the papers or in the evidence. This witness gave no evidence whatever to shew himself versed in the law of Hungary as to marriage. He stated that it was a marriage certificate, issued in the Hungarian language, by the Hungarian country, and that it was an official marriage certificate. He said that it was from a Budapest Roman Catholic presbytery, or residence of the Roman Catholic priest, purporting to be made up from a certain marriage book. Apparently he did not translate it literally but gave what he said to be the effect of it. I take his evidence only to mean that, after reading it over, it seemed, on its face, to him to be a marriage certificate.

No evidence was called as to the laws of Hungary with regard to marriages; so that there is nothing before the Court to shew where, or how the marriage ceremony might be lawfully performed according to the law of Hungary, and, there was also no evidence whatever to shew that the register, from which this certificate purported to be taken, was a public register, or record, or that either the register, or the extract or copy, whichever it was, which was produced to the Court, would be evidence of the marriage in the Courts of Hungary.

There was the further evidence relied on that the defendant, in letters he had written, had referred to the woman as the plain-

tiff's wife. There was no evidence to shew that he knew this, further than might be implied from the fact that he knew they were living together as man and wife.

The first English case of importance, it seems to me, is *Morris v. Miller*, 4 Burr. 2057 [98 English Reports 73]. That was an action for criminal conversation. Proof was given of cohabitation, and general reception of the woman as the man's wife, and it was proved that, after their alleged marriage, articles had been drawn up between them, for the settling of the wife's estate; and I assume that therein she was referred to as his wife. At the end of the argument, and before judgment was delivered, Lord Mansfield said:—

Proof of *actual* marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred.

In delivering the judgment of the Court, he said:—

We are all clearly of opinion, that in this kind of action . . . there must be evidence of a marriage *in fact*: acknowledgment, cohabitation, and reputation, are *not sufficient* to maintain this action.

This is a sort of criminal action. . . .

It shall not depend upon the mere reputation of a marriage, which arises from the conduct, or declarations, of the plaintiff himself. . . .

No inconvenience can happen by *this* determination; but inconveniences might arise from a *contrary* determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action.

There was a judgment of nonsuit.

In *Birt v. Barlow*, 1 Doug. 171, at 174 [99 English Reports 113], Lord Mansfield, says:—

An action for criminal conversation is the only civil case in which it is necessary to prove an *actual* marriage. . . . An action for criminal conversation has a mixture of penal prosecution; for which reason and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me, in the case of *Morris v. Miller*, 4 Burr. 2057, that in such an action, a marriage in fact must be proved.

In *Birt v. Barlow*, 1 Doug. 171, an actual marriage was proved; but a rule for a nonsuit was made absolute, for lack of evidence of identification of the plaintiff and his alleged wife,

as the actual persons who were so married. Towards the end of the judgment Lord Mansfield suggests that there might have been proof in such a case by the bell ringers, the handwriting of the parties, or the persons present at the wedding dinner, but it must be noted that, in so doing, he was only referring to the question of identification of the parties and not to proof of the marriage itself.

In the report of *Morris v. Miller*, in 1 W. Bl. 632, it is stated that Lord Mansfield suggested that, if the register had been burned and the parson and clerk were dead, the marriage might be proved by a person present at the wedding dinner, and that stricter proof would be required in a case of bigamy than in one of criminal conversation. Those statements do not appear in the report in 4 Burr. 2057, cited above, which seems to be really the more careful one. I can not but think that, if made, the proof by the person at the wedding dinner was meant only to refer to proof of the identity, as in the subsequent case of *Birt v. Barlow*, 1 Doug. 171. But, in any case, these observations, if made, were *obiter dicta*, and the suggestion as to less proof being required than in bigamy has not been followed. Also, they could not be taken as covering the case of proving a foreign marriage, as to which the case of *Catherwood v. Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334, and the *Perth Earldom* case, 2 H.L.C. 865, which I refer to later on, hold that there must be proved as a fact, by persons versed in the laws of such country, what the law there was as to marriage, and that the ceremony was in accordance with that law.

I take it that the marriage that had to be proved in an action for criminal conversation in England (before that kind of action was abolished there) could have been proved by the evidence of witnesses, who were present at, and saw, the ceremony take place in a church building of the Established Church of England, in England. But that would be held sufficient because the Courts took cognizance of the fact that by the law of England all such churches were places where marriages might

lawfully be solemnized. But, even in England, where the marriage, to be so proved, took place in a chapel of any other religious body than the Church of England, the testimony of such witnesses had to be supplemented by proof that such chapel was licensed for the performance of marriages: *Reg. v. Mainwaring*, 1 Dear. & B. 132. In other words, such a marriage had to be proved to have taken place according to the marriage law of England. With such further evidence required of a marriage, in the very country where the action is brought, it seems to me impossible to hold that, in the case of a foreign marriage, proof that it was celebrated according to the law of the country where it took place, could, in a similar action, be held unnecessary.

Catherwood v. Caslon, 13 M. & W. 261, 13 L.J. Ex. 334, was another action for criminal conversation. The plaintiff, an Englishman, domiciled in England, went through a marriage ceremony, at the English Consular office at Beyrout, in Syria, with the daughter of the Consul, who was an Englishman. The marriage was celebrated by an American missionary, according to the rites of the Church of England, though the missionary was not proved to have been in Episcopal Orders. The parties cohabited and were received as man and wife, and a son was afterwards born to them. The case went to the jury and the plaintiff recovered a verdict. A special case was submitted to the Court of Exchequer, by which the Court were to be at liberty to draw any inferences which, in their opinion, the jury would be at liberty to draw from the facts, and the question was, whether the proceedings constituted a marriage. Parke, B., delivered the judgment of the Court, holding (1) that because the missionary was not proved to be in Episcopal Orders such a marriage was not valid by the common law of England. He then said:—

But, on the second argument, it was contended that in the action for criminal conversation, which is, as it was argued, an action against a wrongdoer, it was quite sufficient to prove that the parties intended to celebrate, and that in *their belief* they did celebrate, a

lawful and formal marriage, and that, as they afterwards cohabited as man and wife, upon the faith of this *bond fide* belief, it constituted *prima facie* a sufficient marriage *de facto*, and was a good foundation for the plaintiff's maintaining this action against the defendant, at least until the defendant shewed affirmatively that the marriage was unlawfully contracted, which it is clear he has not done here. Upon the facts as stated, we do not know what was the marriage law of Syria, where this took place, as to the marriages of British subjects there residing, not whether British Christian subjects might not marry by a form allowed in that country, without any violence to their religious feelings. And we, therefore, are left in complete uncertainty whether the marriage be unlawful, if it be necessary for the defendant to shew that to be the case. The question, therefore, is, whether the plaintiff must, in the first instance, shew this marriage to be clearly legal, or whether he has done sufficient to cast the burden of shewing the contrary on the defendant. And we think that this burden is on the plaintiff, and that he has not done sufficient to establish a *prima facie* case against the defendant. The cases of *Morris v. Miller*, 4 Burr. 2057, 1 W. Bla. 632, and *Birt v. Barlow*, 1 Doug. 171, and the uniform practice ever since their decision, seems to have settled, that in actions of this nature, as in the indictment for bigamy, it is necessary for the plaintiff to shew what the Courts call a marriage in fact, which we think is an actual marriage, valid, or avoidable, and not yet avoided; see 3 Inst. 88; and that acknowledgment, cohabitation, and reputation, which raise a presumption of a valid marriage, are not sufficient.

Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties *suppose* to be sufficient to constitute that relation, is not enough. It must be shewn to be sufficient according to law for that purpose. If this were not required, it might happen that a defendant might be made responsible in a case in which the act complained of was done by the supposed wife, with the full intent of putting an end to the invalid and void contract into which she might have entered. It is therefore very reasonable to hold, that a husband, in this action, must establish a contract of marriage binding both on himself and on his wife, and shew the fact of adultery during the continuance of this contract.

Here the plaintiff has not shewn such a contract. It is quite consistent with all the facts here proved, that the supposed wife of the plaintiff has quitted him, and gone to cohabit with the defendant, because, though, at the time of the ceremony, she intended to contract, and believed she did contract, marriage with the plaintiff, she has since discovered that she made no contract binding upon her on that occasion. If she married the defendant, she could not on this proof be convicted of bigamy, and according to the authorities, the two cases appear to depend on the same principle.

I have quoted this at length because it seems to me very strongly in point. It tends to shew that a marriage in a foreign country must be shewn to have been according to the law of that country, and that the burden of shewing this is on the plaintiff, and that, not having shewn it, he does not establish an actual marriage or marriage in fact. The learned Judge gives, at greater length and more fully, the same reasons which Lord Mansfield relied on in the cases above cited.

In the *Perth Earldom* case, 2 H.L.C. 865, the claimant, in proof of his pedigree, put in evidence attested copies of extracts from the register of marriages, births and deaths kept in certain places in France. The witness who produced them, and had compared them with the originals, proved that they were kept in an official place and under the care of official persons.

It will be noted that two things were there proved which are not proved in the present case; that is, that they had been compared with the originals, and were kept in official places under the care of official persons. Yet this evidence was objected to on the ground that these documents were matter of foreign law, which foreign law should be proved by competent witnesses, and that it must be proved that the registers were kept according to the laws of France, and that they would be received in evidence in France. The Lords of the Committee agreed with this, and required the evidence of a French lawyer, to prove the above facts, before they would receive these certificates in evidence.

It is stated in a number of cases that the proof of marriage, in a case like this, must be as strong as would be required in a case of bigamy.

Reg. v. Smith, 14 U.C.R. 565, was a case of bigamy. To prove this marriage (to one Mary Patterson) two parties, who had been present at the wedding, gave evidence. One of them had himself been married at the same time. Their evidence was that the marriage took place before one Parsons, a justice of the peace, at Manchester, in the State of New York. One witness testified that he subsequently saw the fact of that justice of

the peace's election, as such, in the town records of Manchester, in the possession of another justice of the peace, and in the latter's office, and was told by him that it was a record book, and that the book did contain entries of the election of town officers. Sir John Robinson delivered the judgment of the Court of Queen's Bench for Upper Canada. After reciting the facts, he stated as follows:—

Now, we know that by the common law of England such a person could not legally solemnize marriage. In our own country we know that a justice of the peace could do so, and can still, under certain restrictions, but we are not therefore at liberty to infer that a justice can do the same in the foreign country where it is alleged the prisoner was married to Mary Patterson. Proof, therefore, was necessary of the authority, and the proof that was given amounts only to this: that Parsons was a justice of the peace in the State of New York at the time; that he did as such assume to solemnize matrimony in another instance as well as in this; and the same witness who swears this, the brother of Mary Patterson, swears in direct and positive terms that Parsons, as a justice of the peace, had authority in the State of New York to marry. The witness who gave this evidence did not state whether it was by any written law of that country that the authority was given, or whether without any written law marriages by a justice of the peace are or were then held valid in that country. We can as individuals have no doubt that he speaks correctly, for we have heard the authority of justices of the peace to solemnize marriage in the State of New York proved upon various occasions in such a manner as was clearly sufficient according to our law of evidence. But we cannot act in a case of this kind upon the knowledge which we have acquired in other cases; and the question is whether evidence of the foreign law in this respect, given by a person who never at any time, for all that appears, was a lawyer, or an inhabitant of the foreign country in question, can be received as evidence.

We are of opinion that it can not, and that in this case such proof of a valid marriage as the law requires was not given.

Reg. v. Duff, 29 U.C.C.P. 255, was another case of bigamy. The evidence produced was, first, a deed of land, made by the accused, after the second marriage, to a trustee, to pay the rents and profits to his first wife. This deed contained a power of revocation by the grantor. The trustee named in the deed testified that the accused told him when the deed was made that the land had been bought with the first wife's money, and he wanted the rents to go to her every three months. He stated

to the trustee the name and address of the first wife. The trustee's wife testified that she had heard the accused asking the trustee to take upon him the trust for the benefit of the accused's first wife and their child.

On a reserved case it was held by Wilson, C.J., and Gwynne, and Galt, JJ., that the evidence shewed that the object of the deed was, really, to deprive the second wife of any claim on the land, and that the statements of the accused, of the existence of the first wife, were not statements against his own interest, and, therefore, were not evidence against him.

In Wigmore on Evidence, sections 2084 and 2085, it is admitted that the law, as to evidence necessary to prove a marriage, was plainly determined in *Morr's v. Miller*, 4 Burr. 2057, and *Birt v. Barlow*, 1 Doug. 171, and has ever since been accepted. He holds the grounds taken by Lord Mansfield to be (1) that the action was penal in its nature and says that it has always been so treated in a marked manner in England, and also that, to receive habit and reputation alone, might enable a man, having a mistress, to recover damages for her seduction. Wigmore says that, so far as the first reason is concerned, it stands, or falls, with the general policy of establishing a special rule for criminal cases, and that, so far as the second reason is concerned, it is indeed based on a real contingency, yet he thinks it doubtful whether there is any need of exercising special vigilance on behalf of a defendant, whose conceded conduct deprives him of honourable sympathy.

It seems to me that, if the first ground is still the law of England, and apparently it is admitted by Wigmore to be, that a comment as to the second need not be considered, especially as that comment, though the view of the learned text-writer in no way changes the binding effect of the two decisions by Lord Mansfield and one by Baron Parke, which I have quoted.

The plaintiff's own testimony seems to me quite insufficient to prove more than that he believed he went through a marriage ceremony. It does not prove any of the requisites of the

marriage ceremony according to the law of Hungary, and I take the effect of the above authorities to be, that the law of Hungary, and compliance with that law of Hungary, have both to be proved in this Court as facts, to shew that the marriage was an *actual one*.

Marriage depends on law as well as on the fact that the parties to it purported to marry. In trials for bigamy some Judges have held (though there has been a great diversity of opinion on the point) that statements by the accused, of the fact of the first marriage, may be taken by juries to be sufficient proof of it, as a legal marriage—at least when those statements were not made, as in *Reg. v. Duff*, 29 U.C.C.P. 255, in the accused's own interest. It is cogently pointed out by Mr. Justice Barry, in *Reg. v. Griffin*, 4 L.R. Ir. 497, that

if the admission be not evidence of a legal marriage, no man should be allowed to plead guilty to a charge of bigamy. Such decisions seem to me to be only arguable on the ground that, in an admission against his own interest, the accused should be presumed to know the law, or, perhaps that, in such a case, the moral guilt would be the same whether the first marriage was, or was not, a legal one, if the accused believed it to be according to law; that belief being implied from his admission.

But I fail to see how any such principle can apply to enable a plaintiff—seeking, in order to promote his own interest, or advantage, to recover damages in an action for criminal conversation—to ask that, because he swears he went through what he believes to have been a marriage ceremony—the legality of which depends on foreign law, of which our Courts do not take judicial cognizance, but which, when a necessary element of a case before them has to be proved as a fact—such proof should be held unnecessary and the legality of the foreign ceremony, as a marriage, taken for granted.

Some confusion has arisen from numerous dicta that, in criminal conversation, the proof must be the same as in bigamy. That may be correct in reference to proof in the ordinary way. But I think no Judge has ever laid it down (or meant to do so) that in criminal conversation the mere statement, under oath,

or otherwise, by the plaintiff, that he had been married to the woman, should have the same effect, in proof of marriage, as an admission by the accused, in bigamy, might have as proof of guilt. I am unable, therefore, to see that judicial decisions as to the effect of such an admission are in any way applicable to this case.

Further, to hold that the plaintiff's uncorroborated testimony could be sufficient proofs of the marriage, would open the door for the bringing of actions by men who were not really married to the women they claimed were their wives, as suggested in *Morris v. Miller*, 4 Burr. 2057. Wigmore seems to suggest, that because actions of this kind are less frequent than in Lord Mansfield's time, a less stringent rule of proof of the marriage should now prevail. I cannot see the force of that argument. Though the volume of such actions has diminished, the need for protection from possible blackmail is, in each action brought, as great as ever.

As to the certificate no attempt was made to shew that the witness, who stated what he considered its meaning, was acquainted with the Hungarian law of marriage. There is nothing in the English or Manitoba Evidence Acts that makes such a certificate evidence by itself. In the absence of proof that the certificate was an extract from a register of marriages, properly kept according to the law of Hungary, and that such a certificate would, itself, be evidence of the marriage, in the Courts of Hungary, it should, in my opinion, not have been admitted in evidence, or its effect read to the jury. I do not see that, if the witness had translated it verbatim, it would have made it any better in this respect.

The admissions in the defendant's letters cannot, because they are in writing, I think, stand on any better plane than if they were verbal admissions; and the case of *Morris v. Miller*, 4 Burr. 2057, shews that a verbal admission by the defendant that the woman was the plaintiff's wife, is not proof of the fact in an action such as this.

I think the plaintiff has failed to meet the burden cast upon

him in respect of proving the marriage, and would set aside the verdict and enter a nonsuit.

It is argued that the effect of such a view is to make it extremely difficult for a person, married in a foreign country, to procure the evidence of that marriage, because, although it might be proved by the issue of a commission, the plaintiff would perhaps be too poor to incur the expense of the issue of a commission. I can only understand that argument as meaning that, otherwise necessary proof may be dispensed with where the party, on whom it lies to give that proof, is too poor to get it—a reason which, of course, cannot be maintained. Apart from that, however, I think that the assertion of such a ground overlooks entirely the effects which might result from the absence of such strict proof, and which are referred to by Lord Mansfield and Baron Parke, in their judgments above quoted.

PERDUE, J.A.:—This is an action brought by the plaintiff against the defendant for criminal conversation with, and alienation of the affections of, the plaintiff's wife. The jury returned a verdict for the plaintiff and awarded him damages in the sum of \$1,000. At the close of the plaintiff's case defendant's counsel moved for a nonsuit upon the ground that the marriage of the plaintiff to his alleged wife had not been sufficiently proved. The motion was renewed at the close of the case. The defendant asks that a nonsuit be entered on this ground. He also takes the objection that the defendant's examination for discovery should not have been admitted in evidence against him on the ground that a defendant in a criminal conversation action cannot be compelled to appear and be examined for discovery, and, if he did so appear and was examined, his evidence, given on such examination, could not be used against him, under 32 and 33 Vict. (Imp.) ch. 68, sec. 3, and on the authority of *Fleury v. Campbell*, 18 P.R. (Ont.) 110. In regard to this latter objection it appeared that the defendant was called at the trial as a witness in his own behalf and, on cross-exam-

ination, all the important parts of his examination on discovery were reiterated by him. I do not think that it is necessary to further consider this point, especially in the view I take in regard to the first objection.

Up to the close of the plaintiff's case the only proof of his marriage is contained in the following passage in his own evidence:—

Q. You came from where? A. From Moravia.

Q. You came from Moravia? A. Yes.

Q. Were you a married man? A. Yes. I was married in the old country.

Q. What place? A. Hungary, Budapest.

Q. You were married in the old country, in Hungary, Budapest. A. Yes.

Q. When? A. 17 years ago.

Q. By what ceremony? A. In the Court and in the Church.

Q. You were married in the old country in the Church? A. Yes.

Q. That is, you were in Court, what is called a civil ceremony? A. Yes, sir.

Q. And in the Church? A. Yes, sir.

Q. What Church. A. The Roman Catholic, Budapest.

Q. That is the sacramental ceremony of marriage? A. Yes.

After the defence was closed the plaintiff's counsel tendered in evidence a document called a marriage certificate, purporting to certify to the marriage of the plaintiff and his wife. Defendant's counsel strongly objected to the reception of this document as evidence. One of the witnesses who understood the Hungarian language was recalled, and, notwithstanding the objection of defendant's counsel, the witness gave to the jury a translation of the contents of the certificate and attempted to prove other facts in connection with it. This witness was an ordinary workman and made no pretence of having any special knowledge in regard to the certificate, beyond understanding the language in which it was written. It is not clear from the shorthand writer's copy of the evidence furnished to this Court, whether the document was filed as an exhibit or not. The Court record contains no entry of it, and the document is not amongst the papers put in at the trial.

The certificate merely purported to have been issued from an

office in Hungary. The authenticity of the certificate or of the records to which it referred was not proved, and there is no evidence that the certificate was issued under any lawful authority. Nothing was proved in regard to the certificate except what appeared on its face. It is clear that the certificate was not receivable in evidence: see *Lyell v. Kennedy*, 14 A.C. 437, 448, 449; *Finlay v. Finlay*, 31 L.J.N.S. Pro. & Mat. 149. The trial Judge should not have allowed a translation of it to be given to the jury. The only evidence of marriage, therefore, which was properly before the jury was that which the plaintiff himself gave and which appears in the extract already quoted.

It has long been settled law that in an action for criminal conversation with the plaintiff's wife, the plaintiff must prove an actual marriage whereby the relation of husband and wife was really created. In *Morris v. Miller*, 4 Burr. 2057, Lord Mansfield said:—

We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation and reputation are not sufficient to maintain this action. . . . This is a sort of criminal action; there is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself.

In *Catherwood v. Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334, also an action of the same nature, it was sought to prove a marriage between two British subjects alleged to have taken place in Syria. Both parties were members of the Church of England. The marriage was celebrated by an American missionary, according to the rites of the Church of England. The parties afterwards cohabited and lived together as man and wife. It was held that a marriage had not been proved because it had not been shewn to have been celebrated in the presence of a priest in holy orders. Parke, B., in giving judgment, said:—

Unless the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that relation, is not enough.

These cases indicate that in a criminal conversation action, the fact that a marriage took place must be established with the same degree of certainty as would be required upon an indictment for bigamy. As to the proof required in the latter action, see *Reg. v. Smith*, 14 U.C.R. 565; *Reg. v. Duff*, 29 U.C.C.P. 255; Roscoe's Crim. Ev., 13th ed., p. 272.

In the present case the plaintiff and his alleged wife were citizens of a foreign country when the alleged marriage ceremony took place, and it was said to have been performed in that country. Our law recognizes and holds valid a foreign marriage when it has been performed according to the rites or ceremonies held requisite by the law of the country where the marriage has taken place. Our Courts give effect to the principle that the form of the contract is governed by the law of the place where the contract takes place: Dicey, *Con. of Laws*, 2nd ed., 615, 616:—

The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.

Sottomayor v. DeBarros, L.R. 3 P.D. 1, 5; see also *Ogden v. Ogden*, [1908] P. 46. If then the plaintiff seeks to prove in a Court of law in Canada that he was in fact married in Hungary to the woman he calls his wife, both being domiciled in that country at the time, he must shew that such marriage was performed according to the rites and ceremonies held requisite by Hungarian law. It is not sufficient for him to state merely that he was married "in the Court and in the Church." He must go further and shew that his marriage was a valid one in Hungary.

It was argued that the defendant had in effect admitted the marriage by speaking of the woman as the wife of the plaintiff. But it is clear that he was referring to her general repute as such. He does not appear to have had any knowledge that the marriage took place in fact or that it was celebrated in legal form.

It is scarcely necessary to point out that in ordinary civil

actions marriage may be presumed where the parties have lived together for a long period as man and wife and have been regarded and received as such: *Doe v. Fleming*, 4 Bing. 266; *Piers v. Piers*, 2 H.L.C. 331; *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*, 6 A.C. 364; *Phipps v. Moore*, 5 U.C.R. 16. But on an indictment for bigamy, or in the *quasi* criminal action for damages against an alleged adulterer, such rule does not apply and a valid first marriage must be proved: see Taylor Ev., 10th ed., par. 172.

It only remains to be pointed out that section 30 of the Marriage Act, 1906, only applies to marriages heretofore or hereafter solemnized in this province where the minister or other person who solemnized the marriage was not duly authorized, or where any of the requirements of the earlier sections of the Act had not been complied with, but the parties have been living together as man and wife. It does not attempt to make valid a marriage in a foreign country between citizens of that country.

I think the appeal should be allowed with costs. The verdict should be set aside, and a nonsuit entered with costs in the Court of King's Bench.

CAMERON, J.A.:—The plaintiff was married to his wife (who was living at the time the action was brought but died before the trial) at Budapest in Hungary in October, 1896, and lived and cohabited with her thereafter until they separated in consequence of the alleged wrongful conduct of the defendant, which is the subject of this action. The charge is that the defendant had illicit and adulterous relations with the plaintiff's wife for a long time prior to the separation. The defence denies generally the plaintiff's allegations, and specifically that stating his marriage.

The case was tried before Mr. Justice Macdonald and a jury on November 18, 1911, when a verdict was found for the plaintiff for \$1,000. The judgment entered thereon is now moved against on the grounds (1) that the examination of the defend-

ant was improperly admitted as evidence, and (2) that there was no evidence of the plaintiff's marriage as alleged. Objection was also taken to the amount of the damages awarded.

I cannot attach importance to the first ground of objection. The evidence in the examination was in its main features all brought out on the defendant's examination. A new trial could not be awarded on this ground.

The second ground is more formidable. Here the evidence intended to establish the marriage is that of the plaintiff himself, who swore that he was married at Budapest in Hungary, "in the Court and in the Church," that is by both a civil and a religious ceremony. He lived with his wife for sixteen years and they had a child, issue of the marriage, who died at the age of five years. There was also put in, in corroboration, a certificate, purporting to come from the Church authorities in Budapest. To this objection was taken on various grounds, amongst them, that the provisions of the law relating to solemnization of marriage in Budapest were not given in evidence. Plaintiff's counsel did not, however, rely upon this certificate, but upon the direct evidence of the marriage contained in the plaintiff's testimony.

It is urged that this proof is wholly insufficient.

If persons live together as man and wife, it will, in favour of morality and decency, be presumed that they are legally married.

But to this rule there are in England two exceptions.

Both on an indictment for bigamy, and on a petition claiming damages against an alleged adulterer (which, under the Divorce Acts, has taken the place in England of the action for criminal conversation), a valid first marriage must be proved; and even the proof of a ceremony, which the parties supposed to be sufficient to constitute the relation of husband and wife, is not enough, unless it be shewn to be legally valid: Taylor on Evidence, sec. 172.

The special rule concerning evidence of marriage in actions for criminal conversation, was first laid down by Lord Mansfield in *Morris v. Miller*, 4 Burr. 2057. There the man and woman

were married at Mayfair Chapel. The register or books could not be given in evidence. Keith, who married them, was transported; and the

clerk, who was present, was dead. So that the plaintiff could not prove the actual marriage by any evidence.

The plaintiff proved articles made after marriage,

also cohabitation, name and reception of her by everybody as his wife, though we did not indeed prove it by any register, or by witnesses who were present at the marriage.

Evidence was also given of a confession by the defendant of adultery with plaintiff's wife. Lord Mansfield held in

an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact: acknowledgment, cohabitation and reputation are not sufficient to maintain this action.

But we do not at present define what may or may not be evidence of a marriage in fact.

In this decision Lord Mansfield himself made the law as he pointed out in the subsequent case of *Birt v. Barlow*, 1 Doug. 171, 174.

But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes. . . . it struck me, in the case of *Morris v. Miller*, 4 Burr. 2057, that in such an action, a marriage in fact must be proved.

But he pointed out also that marriages are not always registered, where proof by register would be impossible and other proof would be admissible. Mr. Justice Blackstone says at p. 171:—

That the best proof that could be given of an actual marriage, was by some person personally present at the solemnity.

In *Morris v. Miller*, 4 Burr. 2057, as it is reported in Sir W. Blackstone's reports, at p. 632, Lord Mansfield's judgment is differently reported, thus:—

In these actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact; as by a person present at the wedding dinner, if the register be burnt and the parson and the clerk are dead.

So that all that is necessary is proof of a "marriage in fact" or of an "actual marriage," which signifies "as a rule of evidence, in these decisions, proof of an eye-witness, i.e., either by the register containing the parson's entry or by the oral testi-

mony of parson, clerk or some other person present at the ceremony:" Wigmore on Evidence, sec. 2084. It is not laid down that there must be evidence of the validity of the marriage ceremony, but that there must be strong evidence of the marriage itself, more than mere evidence of cohabitation and reputation.

Now, in this case, we have the evidence of an eye-witness, to wit: the plaintiff. His evidence would not have been admissible in England at the time when *Morris v. Miller*, 4 Burr. 2057, was decided (1767) or *Birt v. Barlow*, 1 Doug. 171 (1779). The common law rule disqualifying parties to actions of this kind as witnesses remained in force until 1869 (32 & 33 Vict. ch. 68). So that until then the question of proving a marriage by the evidence of a party could not arise.

I think it can be forcibly contended that the plaintiff's evidence in this case is strong evidence of the fact of his marriage; and, in fact, the best evidence within his power to give, and, therefore, it is sufficient to meet the requirements of defendant's counsel as set forth in *Morris v. Miller* (p. 2058), to which the Court there gave effect, although it refused to define what might or might not be evidence of a marriage in fact (p. 2059). But that best evidence (referred to in *Morris v. Miller*, 4 Burr. 2057) certainly could not at the time of that decision be the evidence of one of the parties to the action and to the marriage under the common law rule, disqualifying parties as witnesses, then prevailing.

The question is undoubtedly rendered more difficult by the decision of the Court of Exchequer in *Catherwood v. Caslon* (1844), 13 M. & W. 261, 13 L.J.Ex. 334. The plaintiff there was an Englishman, domiciled in England, travelling in Syria, who married the daughter of the English consul at Beyrout, he being twenty-one years of age and she under that age. The marriage was celebrated by an American Missionary according to the rites of the Church of England, of which both parties were members. Afterwards the parties cohabited as man and wife and had a son, issue of the marriage.

The case was twice argued. On the first argument it was held that the marriage was invalid on the authority of *R. v. Millis*, 10 Cl. & F. 534, which case was decided by the House of Lords, largely on the effect of the Marriage Act, 26 Geo. II. ch. 33. This judgment of the House of Lords was by a Court equally divided, and has been questioned by competent authority, to which I shall refer hereafter. In any event it was sufficient to justify the annulment of the Catherwood marriage on the ground that it was not celebrated in the presence of a priest in Episcopal orders.

On the second argument it was contended that the action being one of criminal conversation it was sufficient to shew that the parties had gone through a solemn ceremony with the *bonâ fide* intention of contracting a valid marriage, and had subsequently cohabited. Baron Parke, delivering the judgment of the Court, held, that, since *Morris v. Miller*, 4 Burr. 2057 and *Birt v. Barlow*, 1 Doug. 171, it was

necessary for the plaintiff to shew what the Courts call a marriage in fact, which we think is an actual marriage, valid or avoidable, and not yet avoided.

Then he goes further, in my humble opinion, than is justified by the cases relied upon by him as authorities when he says:—

And if the plaintiff prove a marriage whereby the relation of husband and wife is really created, he cannot succeed; and the mere proof of a ceremony which the parties suppose to be sufficient to constitute that relation, is not enough. It must be shewn to be sufficient according to law for that purpose.

He further goes on to point out that the supposed wife may have left the plaintiff and gone to cohabit with the defendant because she had discovered that the contract of marriage assumed to have been entered into at Beyrout was not binding on her.

I would point out that in the *Catherwood* case, the marriage was invalid under *R. v. Millis*, 10 Cl. & F. 534, which case, of disputed authority, was based upon provisions of the English Marriage Acts, wholly inapplicable here. The country in which Beyrout is was at the time Mohammedan in point of religion.

Furthermore, the parties in the *Catherwood* case were an Englishman and an Englishwoman, both domiciled at the time of the marriage in question in England and both were members of the Church of England. I do not imagine that Baron Parke intended his judgment to go any further than the facts of the case immediately before him warranted or necessitated. I certainly do not feel inclined to give it any wider application. To us to-day, and in this country, the decision in the *Millis* case appears to have inflicted a great wrong and would surely not now be held to be a binding authority.

As to that case, see the remarks of Lord Campbell in *Beamish v. Beamish*, 9 H.L.C. 274 at 337, where he says that he deemed the decision that unless a priest, especially ordained, were present at the ceremony, the marriage was null and void and the children thereof illegitimate, was so unsatisfactory that he resorted to the extraordinary expedient of entering a protest against it in the Journals of the House.

In *Mainwaring's* case, 1 Dear. & B. p. 139, Mr. Justice Willes declared that the decision in *Catherwood v. Caslon*, 13 U. & W. 261, 13 L.J.Ex. 334, turned upon *R. v. Millis*, 10 Cl. & F. 534, which I shall never consider as a binding authority.

Here, at any rate, the facts are wholly different from those in the *Catherwood* case. We have no declaration of this or any other Court that the marriage here in question was invalid. On the contrary, practically the opposite is the case, in that there has not been the slightest attempt to question its validity here or abroad, and, in fact, the defendant admits it himself. The man and wife here were not Canadians or British subjects, but Hungarians. Their domicile, unquestionably, at the time of the marriage was not here, but in Hungary, where they were living at the time and of which country they were citizens or subjects. The evidence is the best evidence in the plaintiff's power to give, and is more than evidence of "acknowledgment, cohabitation and reputation" for it goes back to the inception of the relation of husband and wife at and by a religious and a civil

ceremony. The religious ceremony was performed in the Roman Catholic Church in Budapest in Hungary, in which the Christian and not the Mohammedan faith prevails. Surely it is the part of common sense to say that a ceremony performed under these circumstances, in a civilized and Christian country, lived up to for sixteen years, and absolutely unquestioned, can and must be assumed to be regular and duly performed. I refer to Lord Ellenborough's dictum in *R. v. Brampton*, 10 East 282, at 289, followed in *R. v. Griffin*, 4 L. R. Irish 497, 503, 14 Cox C.C. 308.

If the plaintiff were to be held here to the strict performance of the very letter of the decision of Baron Parke, what would he have to prove? The law of Hungary relating to the solemnization of marriage? That would not be sufficient, for it would fail to shew that the ceremony in question complied with the law, and that the officer or priest celebrating the ceremony acted in accordance therewith. The plaintiff would also need to prove the official character of the magistrate performing the civil ceremony sixteen years ago, and also it may be, the due Episcopal ordination of the priest celebrating the religious ceremony at the same time. And in all this proposed proof the impossibility of the magistrate or priest identifying this plaintiff and his wife (now dead) with the parties who participated in the ceremonies before them in Hungary, is apparent. These same difficulties face us in supposing an attempt to prove the marriage by virtue of a certificate. That certificate would be useless without additional evidence establishing the law of Hungary and the identity of the ceremony vouched for by the certificate with that referred to by the plaintiff and here in question, and without evidence establishing the identity of the parties named in the certificate with the plaintiff and his wife.

Lord Mansfield said in *Morris v. Miller*, 1 W. Bl. 632, that in such cases there need not be strict proof from the register or by a person present, but that there must be strong evidence, and he went no further than that. There certainly is before us strong evidence, absolutely uncontradicted, of the actual

marriage in this case in the testimony of the plaintiff himself, who, without the slightest attempt being made to impeach his evidence on the point, swears positively to the fact of his marriage. He regarded the woman as his lawful wife and she regarded him as her lawful husband. That is the unquestioned fact.

In addition to this we have the evidence of the defendant, who, throughout his relations with the plaintiff's wife, regarded her as his (the plaintiff's) wife, and speaks of her in that, and no other way. The defendant says that the plaintiff's wife spoke to him of the plaintiff as her husband. That he regarded her as the plaintiff's lawful wife is incontrovertible. The correspondence referred to at p. 158 and put in at the trial also shews this as the defendant's view. His evidence throughout is, I take it, an admission that he knew and acknowledged the plaintiff's wife to be his (the plaintiff's), wife, and that the defendant regarded her in no other light, whatever may have been the nature of his relations with her.

My conclusion, therefore, is that the plaintiff's evidence on the subject of the marriage is evidence of a party to it, an eye-witness, and is therefore evidence of a "marriage in fact" or "actual marriage" within the accepted meaning of the rule laid down by Lord Mansfield. Moreover, we have here the evidence of the defendant in corroboration, to which weight must be given. See Wigmore on Evidence, sec. 2086.

As for the rigid rule of proof laid down by Baron Parke, I would consider it inapplicable to this case for the reasons I have stated. To enforce that rule here or in cases like this would be simply a denial of the right to bring an action, as in practice it would be impossible to comply with it.

With reference to proof of marriage in bigamy cases, the decisions are collected in Crankshaw's Criminal Code, 338-341:—

The fact of the marriage having been validly solemnized may be proved by some person who was actually present and saw the ceremony performed: p. 340.

In support of this the author cites *R. v. Allison*, 1 R. & R. 109; and *R. v. Mainwaring*, 1 Dears. & B. 132.

I cite also the case of *R. v. Newton*, 2 M. & Rob. 503, or *R. v. Simmonsto*, 1 Car. & K. 164. In that case the prisoner shortly after his return to England had told his wife's sister of his marriage in New York by a Presbyterian clergyman and he had also referred to her as his wife on other occasions. It was left to the jury to say whether this was not sufficient evidence "that the law had been a valid one according to the law in force at New York." That is the important feature of that case as bearing upon the case now before us. The admission was held sufficient to establish not only the fact of the ceremony, but the validity of the ceremony according to the foreign law. This point is altogether apart from that of the obvious propriety of allowing evidence of an admission made by a party against his own interest, or from that that the defendant in a bigamy case,

in acknowledging marriage, speaks of the fact in which he was personally concerned, and of the truth of which he cannot possibly be ignorant,

as said by Robinson, C.J., in *Campbell v. Carr*, 6 U.C.Q.B.O.S. 484. The *Newton* or *Simmonsto* case goes farther than that, for it holds that the admission of a defendant is not only evidence against the defendant in a bigamy case, of the fact of the first marriage, but is also evidence of the foreign law.

In *Regina v. Smith*, 14 U.C.Q.B. 565, proof of the first marriage was given by the brother of the woman, both of whom were brought up in Upper Canada, and were apparently British subjects. The brother said he was present at his sister's marriage with the prisoner in the State of New York before a justice of the peace, "a magistrate having power to marry," and that the two lived thereafter as man and wife for a short time. The prisoner was found guilty and sentenced to three years in the penitentiary, but a case was reserved for the opinion of the Court as to the proof of the validity of the first marriage in the State of New York. The Court held that the evidence given by the brother, that the justice of the peace had power, was insufficient as it was "given by a person who never at any time,

for all that appears, was a lawyer, or an inhabitant of the foreign country in question." The decision goes no further than that. In this present case the plaintiff made no statement as to the persons who officiated at his marriage, and I can find no authority requiring that he should do so. Moreover, the plaintiff was an inhabitant of the foreign country in question here, as also was his wife. I would not extend the decision in *Regina v. Smith* in its application any further than required by the facts set forth. And it is to be borne in mind, that the Court considered the question of evidence in the case of a prisoner already sentenced to three years in the penitentiary.

No doubt we must take Lord Mansfield's rule as binding. But we must remember the peculiar social conditions prevailing at the time the judgment was rendered when, for reasons stated in Wigmore on Evidence, sec. 2084, note, this particular form of action flourished and was naturally an attractive means of blackmail. These conditions no longer exist, and so far as the defendant in such actions is concerned, and the propriety of giving him any special protection,

it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honourable sympathy: *Ib.* 2084.

It is on such grounds as these that I would place a liberal construction on Lord Mansfield's rule and would restrict the application of Baron Parke's judgment in the *Catherwood* case to cases similar in circumstances to that case.

Strong evidence must, it is true, be given in such a case as this of the actual marriage, something more than mere evidence of cohabitation and reputation. But if this form of action is to be allowed at all, restrictions as to evidence, impossible to be complied with, should not be thrown in its way. The modern tendency is in the interests of public justice to relax the strictness of a rule of evidence which tends practically to block the plaintiff's right to recover. When the plaintiff has gone into the box, deposed positively as to his marriage, which is not impeached in the most indirect way or by the slightest evidence,

~~When~~ he has lived with his wife for sixteen years, and had issue by her, and where that relationship has been acknowledged by the public, and more particularly by the defendant, by his words and conduct, it does seem to me that strong and amply satisfactory evidence has been given of the fact of the marriage within the fair intent and meaning of Lord Mansfield's rule. I must admit that I have reached this conclusion not without some difficulty but it seems to me justified by authority and by considerations of public interest.

Since writing the foregoing, I am referred to *Rex v. Naoum*, 19 Can. Cr. Cas. 102, 24 O.L.R. (1911), a judgment of the Ontario Court of Appeal, where it was held (on a case stated for the opinion of the Court upon an indictment for bigamy) that an admission of the accused, coupled with evidence of those present at the ceremony, was sufficient evidence of a marriage in Macedonia. It was held, expressly, that the testimony of these witnesses was not sufficient to prove the Macedonian law: *per* MacLaren, J.A., at 311. But the evidence, while not sufficient to prove the foreign law, was held to be not without weight. The various authorities dealing with the question as to the degree of weight, if any at all, that is to be attached to admissions in such cases are dealt with in Mr. Justice MacLaren's judgment. That such an admission, unsupported by other evidence, was sufficient was held by the Court of Appeal for Lower Canada in *R. v. Creamer*, 10 L.C.R. 404, 450n, and by the Supreme Court of the United States in *Miles v. United States*, 103 U.S. 304. I think the judgment of the Supreme Court in expressly upholding (p. 311) the view set out in *R. v. Simmonsto*, 1 C. & K. 164, and that

it is for the jury to determine whether what he (the accused) said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized, is entitled to great weight. A long list of cases is given in support of this view, including *R. v. Upton* (1839), 1 Russell on Crimes, 7th ed., 983; *R. v. Newton*, 2 U. & Rob. 503, or *Simmonsto*, 1 C. & K. 164.

In the *Naoum* case the opposing decisions are referred to also; *R. v. Savage*, 13 Cox C.C. 178, and *Rex v. Lindsay*, 18 Times L.R. 761. The comment of Barry, J., in *Queen v. Griffin*, 4 L.R. Ir. 497, is instructive as to Lush, J.'s, statement in *R. v. Savage*, 13 Cox C.C. 178, as also is his remark that if an admission in bigamy be not evidence of marriage

no man should be allowed to plead guilty to a charge of bigamy.

(In *R. v. Griffin*, 4 L.R. Ir. 497, the point was as to the proof of validity of the second marriage of the accused.)

The conclusion of the Court was that there was ample evidence

if the Judge believed it, as he did, to support the conviction, though

it might have been well if the Macedonian law had been proved.

I consider this opinion of the Ontario Court of Appeal, concurred in by all the Judges, lends support to the view which has appealed to me in this present case.

The learned trial Judge stated expressly that the jury were to assume the marriage as a fact (p. 159) allowing the case to go to them on that assumption. After the jury brought in the verdict, Mr. Howell, said:—

Your Lordship intimated that it would still be open to me to argue the question as to proof of the marriage, if we still saw fit?

And to this the learned trial Judge assented. It seems to me that this procedure, while perhaps unusual, was tantamount to allowing the case to go to the jury, reserving to the defendant the right to move to set aside the verdict on the ground of want of evidence, an arrangement to which the parties agreed.

I would not interfere with the damages awarded by the jury (which cannot be regarded as excessive in an action of this character), and think the motion to set aside the judgment entered must be refused with costs.

HAGGART, J.A.:—I agree with the conclusions arrived at by my brother Cameron, who in his reasons has very fully reviewed the authorities.

The trial Judge apparently was not satisfied as to the sufficiency of the proof of the marriage and in order to shorten

matters told the jury to assume that the parties were married so the question is open and that question is whether there is sufficient evidence of the plaintiff's marriage to support the verdict.

Rex v. Naoum, 24 O.L.R. 306, is a recent case in the Ontario Court of Appeal. The Court was unanimous, and Mr. Justice MacLaren, who delivered the judgment of the Court, collected and reviewed the authorities. A case was stated by the County Court Judge before whom the defendant was tried for bigamy and convicted, and the question stated for the opinion of the Court was, whether there was sufficient legal evidence of the first marriage which took place in Macedonia to warrant the conviction. The evidence upon which the accused was convicted was that of several witnesses who were present when the ceremony was performed; that the ceremony took place in the village Greek church and was performed by the priest of that church in the presence of the villagers gathered there to witness it, and that such ceremony was performed in the same manner and by the same officiating priest as and by whom weddings usually were performed in that village (and in so far as the witnesses were qualified to speak) according to the rites, laws and customs of that country. The evidence also shewed that the prisoner and the woman with whom he went through the ceremony had lived together as man and wife and had two children born to them. There was also an admission made by the prisoner after his arrest. Mr. Justice MacLaren said that if it were necessary to prove the Macedonian law as to marriage he did not think the testimony of the witnesses would be sufficient for that purpose, and while the evidence of the Macedonian witnesses was not sufficient to prove the foreign marriage, there was ample evidence, if the Judge believed it, to support the conviction.

Does our Marriage Act apply to the question before us? What object had our Legislature in view when it revised and amplified our statute respecting the solemnization of marriages?

Before considering the wording of the Act, let us consider the law generally on this subject:—

A cogent legal presumption is raised in favour of any marriage which is shewn to be celebrated *de facto*. . . . If persons live together as man and wife it will, in favour of morality and decency, be presumed that they are legally married.

Taylor on Evidence, 10th ed., par. 172. And text-writers put it stronger and state that the presumption of law must prevail unless broken in upon and is much stronger than any ordinary legal presumption. It is a presumption of law, not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

But this presumption of law in favour of marriage does not hold good under all circumstances. Two exceptions to this are recognized in England. On an indictment for bigamy and on a petition claiming damages against an alleged adulterer which latter is practically our present action for criminal conversation. A valid first marriage must be proved and even the proof to constitute the relation of husband and wife is not enough unless it be shewn to be legally valid: Taylor on Evidence, 10th ed., par. 172; *Catherwood v. Caslon*, 13 M. & W. 261, 13 L.J. Ex. 334; *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 171. The foregoing is a general statement of the law laid down in the text-books.

Let us consider briefly the conditions existing in Manitoba to-day and at the time of the passing of the Marriage Act in 1906. Immigration to our country is invited and encouraged and thousands of families every year are coming from remote countries and primitive communities, and speaking different languages. It may be that more than one half the marriage ceremonies of the residents of Manitoba were celebrated in the home land. Our Legislature, with a view of insuring immigrants in the enjoyment of their marital rights and prompted by the same motives that gave rise to the legal presumptions in civil suits in favour of marriage by special enactment gave

the husband and wife, in cases where their matrimonial civil rights were concerned, a position at least as strong as that enjoyed under the legal presumptions in civil cases. Let us examine our Marriage Act, ch. 41, 1906.

The former statutes are consolidated and revised and three sections, namely 28, 29, and 30, are added. Sections 28 and 29 legalize marriages solemnized by certain clergymen, Salvation Army officers and Quakers, and they apply only to marriages solemnized "in this Province."

Now, take section 30. Observe that the limiting words "in this Province" are designedly left out. It refers to "every marriage heretofore or hereafter solemnized." It evidently applies to the marriage of every person whose marital rights may be the subject of adjudication. The substance of the section is :—

30. Every marriage heretofore or hereafter solemnized between persons not under a legal disqualification to contract such marriages shall after two years from the time of the solemnization thereof or upon the death of either of the parties before the expiry of such time be deemed a valid marriage so far as respects the civil rights in this Province of the parties or their issue and in respect of all matters within the jurisdiction of the Legislature of Manitoba, notwithstanding the clergyman, minister, or other person who solemnized the marriage was not duly authorized to solemnize marriages, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the dispensation thereof or in the issue of the license or notwithstanding the entire absence of either, etc., etc.

It has been contended that this section 30 applies only to marriages solemnized in this Province. Why were the words of limitation "in this Province" expressed in the former sections and deliberately left out of this. Take the example of a farmer just south of parallel 49 selling his farm and moving across the boundary and taking a farm in Canada and becoming a citizen. Can this enactment be invoked by his neighbour who was married in Manitoba and not by the naturalized American?

The Legislature recognized the difficulty of procuring evid-

ence of marital contracts consummated in all quarters of the globe from all people speaking many different languages and by this enactment determined to guarantee our naturalized citizens in the enjoyment of their marital rights.

This action concerns "the civil rights in this Province of the" plaintiff. The marriage is substantially legalized. You could not offer evidence of the non-qualification of the official, nor evidence of the irregularity or insufficiency of the proclamation, or in the dispensation, nor could you question the license or assert the absence of it. The statute practically covers all that constitutes the ceremony. You cannot even challenge the marriage for its invalidity. The statute gives the party a stronger position than he would have in a civil suit under the presumptions which could be rebutted or repelled.

The plaintiff has affirmatively proved the ceremony by an eye-witness, cohabitation, living as man and wife for 16 years, the birth of issue, and the recognition by the defendant of the existence of the relationship of man and wife. This, I think, is sufficient evidence of the marriage.

If section 30 of the Marriage Act applies, then what was formerly a legal presumption has the qualities of a statutory right and covers this suit which is brought to enforce a civil right of the plaintiff.

The appeal should be dismissed.

*The Court being equally divided, the appeal
was dismissed without costs.*

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

REX v. BEVAN.

1. **INTOXICATING LIQUORS (§ III G—86)—EXHIBITING LIQUOR SIGN OR DISPLAYING BOTTLES AND CASKS AT UNLICENSED PLACE.**

To constitute the offence under sec. 111 of the Ontario Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9, in an unlicensed place, of keeping up a bar sign or of displaying bottles and casks so as to induce a reasonable belief that liquors are sold there it is essential that what is done should induce a belief that (a) premises in fact unlicensed are licensed or (c) that liquor, i.e., intoxicating liquor, is "sold or served therein;" the statute requires something more to be shewn than what would be necessary and proper for the sale of non-intoxicating liquors.

2. **EVIDENCE (§ II B—113)—MAINTENANCE OF APPEARANCE OF BAR—DISPLAY OF BREWER'S CALENDARS—SUFFICIENCY OF EVIDENCE.**

Evidence that in an unlicensed hotel there is a bar, and on the bar a beer pump used to pump a non-intoxicating beverage called "local option beer," and that brewer's calendars were there displayed is insufficient to convict the occupant of the offence of keeping up a sign or having a bar containing bottles or casks displayed so as to induce a reasonable belief that the premises were licensed for the sale of liquor, where the former official license sign over the door had been removed, and there was no display of bottles or casks such as are used distinctively for intoxicating liquors nor was there, apart from the brewer's calendars, any display of advertising matter suggestive of the sale of intoxicants in the place.

DECIDED: November 27, 1912.

MOTION to quash a conviction made by the police magistrate of **Hamilton** under section 111 of the Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9.

The conviction was quashed.

J. Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the prosecutor.

MIDDLETON, J.:—Section 111 of the Liquor License Act as it stood before the amendment of 1912 was an eminently reasonable and easily understood provision. In effect it provided that the existence of a bar in any unlicensed premises and the display of liquor therein should be *prima facie* evidence of unlawful sale.

The amendment makes that which was theretofore evidence of an unlawful sale "an offence against this Act;" and this makes it necessary to examine the statute with great care to ascertain precisely that which is raised from the rank of mere "evidence," and constituted "crime."

I pass by the very awkward and almost unintelligible form of the section, and endeavour to ascertain the real meaning. The section reads: "The fact of any person . . . shall be guilty of an offence against this Act." I assume that this may be read as though it provided that any person who does the thing mentioned shall be guilty, etc.

The things so rendered unlawful are "the keeping up of any sign . . . or having . . . a bar or place containing bottles or casks displayed so as to induce a reasonable belief that such house or premises is or are licensed for the sale of liquor, or that liquor is sold or served therein . . ."

"Liquor" in this Act means intoxicating liquor; and it is lawful to sell liquors that do not contain more than two and a half per cent. proof spirit, even if such liquors resemble in appearance and taste liquors that ordinarily contain more than the stipulated amount of alcohol. This has led to the manufacture of what in the evidence is called "Local Option beer."

The sole evidence in this case is that in an hotel which was once, but is not now, licensed to sell intoxicating liquor there is a bar, and on the bar a beer pump which pumps Local Option beer, and "all appliances" and "signs," consisting of calendars and advertising matter, that had decorated the bar and premises when the hotel had a license. The hotel still retained its name. The sign "Licensed to Sell" etc. was removed.

It is essential, to constitute an offence, that what is done should "induce a belief that" (a) premises in fact unlicensed are licensed, or (b) that liquor—i.e., intoxicating liquor—is "sold or served therein."

It is not for me to speculate why the Legislature should make it penal to have a bar so equipped as to induce a "reasonable belief" on the part of the thirsty wayfarer that he could therein obtain a beverage which might intoxicate, when there is in fact nothing to be had but beer containing "less than two and a half per cent. of proof spirits;" it may well be that the lack of the desired percentage can only be discerned by a trained and sensitive palate, and the average man seeking intoxication re-

quires protection from such innocuous beverages; or the desire may be to protect the licensed house whose customers are being deluded by this hollow mockery into the belief that they are in a genuine bar. Be that as it may, it seems clear that there must be more than that which is necessary and proper for the sale of Local Option beer, before an offence is committed; some exhibition of bottles and casks such as usually contain real "Liquor," or some such display of suggestive advertising matter as would lead a reasonable man to the belief that in this unlicensed place liquor was sold. Mere "calendars and one thing or another" is not enough. The bottles, not only were not displayed, but were in the cellar, relics of a departed glory; and the "pump" might indicate the innocent "Local Option beer."

The motion should be granted with costs.

The magistrate should be protected.

Conviction quashed.

[SUPREME COURT, NOVA SCOTIA.]

BEFORE GRAHAM, E.J., MEAGHER, DRYSDALE, AND RITCHIE, JJ.

REX v. PELTON.

1. APPEAL (§ III F—95)—TIME FOR TAKING APPEAL—N. S. RULES, ORDER LVII., R. 3—FAILURE TO GIVE WITHIN TIME LIMITED—TELEGRAM AS NOTICE.

The meaning of rule, O. LVII., r. 3 (Nova Scotia), which stipulates that "the notice of appeal shall be served within ten days from the day that the appellant or his solicitor first had notice that the order upon the decision appealed from had been made," is not ten days from the service of the order nor ten days from the filing of the order, but ten days from "notice" of it, and for this purpose notice by telegram is effective.

2. APPEAL (§ III F—98)—EXTENSION OF TIME FOR APPEALING—DISCHARGE OF PRISONER ON HABEAS CORPUS—ACADEMIC QUESTION.

Where the prisoner had since been discharged upon *habeas corpus* by a judge of the Supreme Court having undoubted jurisdiction and any question as to whether a Master of the court had power to discharge would be merely academic, there is no merit that would call for indulgence by extending the time for appealing from a prohibition order in respect of the Master's previous decision upon a similar application made on the prisoner's behalf.

DECIDED: December 2, 1912.

AN application to quash an appeal from an order granting a writ of prohibition on the ground that the proposed appeal was too late.

The application was allowed and the appeal quashed.

W. E. Roscoe, K.C., moved to dismiss the appeal from the decision of Russell, J., granting an order for the issue of a writ of prohibition on the ground that notice of appeal was not given within the time prescribed by Nova Scotia Orders LVII., R. 3. Service of the order was not necessary. Defendant's solicitor had notice by telegram that the order was granted: *Hopton v. Robertson* (1884) W.N. 77; *Land Credit Co. of Ireland v. Lord Fermoy*, L.R. 5 Ch. App. 323. As to jurisdiction of a Judge sitting as a Court: *The King v. Breckn*, 8 Can. Cr. Cas. 147; *The Queen v. Bowers*, 34 N.S.R. 550.

J. J. Power, K.C., shewed cause.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an application to quash an appeal because it is out of time.

By Order 57, Rule 3, it is provided that the notice of appeal shall be served within ten days from the day when the appellant or his solicitor first had notice that the order upon the decision appealed from had been made. In this case the notice of appeal was not given until more than ten days after the party had notice. It was a notice by telegram and effective. The rule does not mean ten days from the service of the order, nor ten days from the filing of the order, but ten days from his having notice of it.

Ordinarily, there would be a case for indulgence extending the time, but there is no particular merit. The prisoner subsequently was discharged upon *habeas corpus* by a Judge of the Supreme Court, and any argument as to whether the Master of the Supreme Court had power to discharge would be merely academic.

The application will be granted. Costs reserved.

Application allowed.

[COUNTY COURT, VICTORIA, B.C.]

BEFORE LAMPMAN, J.

ROBINSON v. DISTRICT OF SAANICH AND AIKMAN.**1. APPEAL (§ I C—25)—RIGHT TO APPEAL IN CRIMINAL CASES—ACCEPTANCE OF CASH BAIL WITHOUT AUTHORITY—EFFECT ON THE APPEAL.**

Even though a County Court does not possess jurisdiction to permit the giving of cash bail on an appeal from a conviction by a police magistrate under Cr. Code (1906), sec. 797, upon a summary trial, an appeal is not lost where the attorney for the prosecution assents to the acceptance by the court of such bail, receives payment of the money, and permits the prisoner to go at large.

2. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY BACK OF MONEY DEPOSITED AS BAIL.

In an action brought after the allowance by a County Court of an appeal from a conviction by a police magistrate, to recover cash deposited as bail, an allegation in the plaint to the effect that such money was deposited with the defendants as security for the appearance of the appellant, while in another paragraph the money was referred to as having been given as security for costs, does not embarrass or confuse defendants as to what money was claimed by the plaintiff, where the bail money was paid to one of the defendants, since it was received by him as bail only and for no other purpose, notwithstanding that in the order allowing the appeal and requiring the money to be returned, it was referred to as having been given as security for costs.

3. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY BACK OF MONEY DEPOSITED AS BAIL.

Cash deposited as bail with the attorney for the prosecution upon an appeal to a County Court from a conviction by a police magistrate may, upon an allowance of the appeal, be recovered by the appellant.

4. BAIL AND RECOGNIZANCE (§ I—12)—RECOVERY OF CASH BAIL—DEDUCTION OF COSTS—TENDER OF BALANCE.

Where, before the granting of an order by a higher court prohibiting a County Court hearing an appeal from a conviction by a police magistrate, which order carried \$75 costs, such appeal was allowed by the County Court with costs of the same amount, upon a subsequent action being brought by the appellant to recover cash deposited as bail, a tender by the defendants to the plaintiff of the amount of the bail, less the costs of such prohibiting order, was refused, the court declining on the ground that a counterclaim had not been filed, nor a tender, pleaded, nor any money paid into court, to consider whether the defendants were entitled to deduct the amount of such costs from the bail money.

5. COSTS (§ I—3a)—ON AMENDMENT—CHANGING NAME OF DEFENDANT.

Upon permitting an amendment as to the name of one defendant from the "municipality of Saanich" to its true corporate name, "the corporation of the district of Saanich," costs will not be awarded the defendants where they were not misled by the error in the name of such defendant.

DECIDED: February 3, 1912.

TRIAL of an action to recover from the defendants a deposit of \$1,000, made as cash bail upon a proposed appeal from a magistrate's conviction, in the circumstances set forth below.

M. B. Jackson, for the plaintiff.

Lowe, for the defendant Aikman.

Aikman, for the defendants the corporation.

LAMPMAN, COUNTY JUDGE:—On the 24th August, 1911, Estelle Durlin, alias Carroll, was convicted by the police magistrate for the city of Victoria for keeping a disorderly house, and sentenced to four months' imprisonment. She appealed to the County Court, and by her counsel, Mr. Robinson, applied for bail. Mr. Aikman appeared for the corporation of Saanich. Mr. Robinson suggested cash bail; and, as Mr. Aikman made no objection—he assented to \$1,000 as being sufficient—I fixed cash bail at \$1,000. At that time, in some way not explained to me, or, if explained to me, not now recalled by me, the Saanich authorities then had in their possession about \$250 belonging to Estelle Durlin; and, while still in my Chambers, Mr. Aikman figured out the balance required to make up the \$1,000, and thereupon instructed the Saanich constable to let Estelle Durlin go free when the balance was paid to him by her. Subsequently, when the appeal came on for hearing before me in the County Court, Mr. Aikman, for the prosecution, took objection to my hearing it, contending that, as I had granted cash bail, which is a form of bail not allowed by the statute, Estelle Durlin had lost her appeal.

Just why an appellant should lose an appeal because of a mistake by me was not apparent, as I could not read the statute in that way; and, moreover, it seemed to me that Mr. Aikman had waived any right to raise such a contention, because of his assenting to cash bail, accepting the \$1,000, and letting his prisoner go free. The appeal came on again before me on the 27th October, being the day set by me for the hearing; the appellant, Estelle Durlin, and her counsel appeared, but the prosecution was not represented. I allowed the appeal, Mr. Robin-

son for the appellant informing me that he had just come from upstairs, where a prohibition motion was being argued before Mr. Justice Morrison; and that, on his informing Mr. Justice Morrison at eleven o'clock that the appeal was coming on at that hour, and that he was in a quandary as to what to do, His Lordship suggested or intimated to him that he should attend on the appeal. I fixed the costs of the appeal at \$75. The order drawn up directed "that the money paid in as security for costs, viz., the sum of \$1,000, be paid out to the appellant's solicitor, Hume B. Robinson."

This was an error, as the money was never paid into Court, and the \$1,000 was not deposited or paid as security for costs, but as bail money. The next day—28th October—I was served with a prohibition order made by Mr. Justice Morrison restraining me from hearing the appeal, which I had already heard and allowed. By the order, Estelle Durlin was ordered to pay the costs of the motion, fixed at \$75.

On the 3rd November, Estelle Durlin assigned to Mr. Robinson the said sum of \$1,000 paid by her as bail money, and notice of the assignment was served on the Saanich authorities and on Mr. Aikman, and on the 3rd November Messrs. Hanington and Jackson wrote to Mr. Aikman this letter:—

Re v. Durlin.

We are instructed by Mr. Hume B. Robinson to demand from you payment of the sum of one thousand dollars deposit made in connection with appeal by Estelle Durlin, alias Carroll, from the Magistrate's Court to the County Court, and which \$1,000 His Honour Judge Lampman has ordered to be paid over to Mr. Robinson.

We understand that you have possession of this money, and we are instructed to request your immediate payment of the same over to us for Mr. Robinson, otherwise we are to issue a writ to-day.

The money was not paid, and Mr. Robinson now sues. The pliant sets out the prosecution in the Police Court, the conviction, and the appeal; and paragraphs 4 and 5 of the pliant are as follows:—

4. In connection with such appeal, the said Estelle Durlin, alias Carroll, was required to deposit the sum of \$1,000 as security for her appearing to prosecute the appeal, and the said sum of \$1,000 was duly paid over by her, and was received by the said defendant Aikman, and the defendant Aikman still holds and retains the said sum

of \$1,000, either under his personal capacity or as solicitor for the defendant municipality.

5. The said appeal duly came on for hearing and was thereupon allowed by His Honour P. S. Lampman, Judge of this honourable Court, and by order allowing the appeal, it was ordered that the sum of \$1,000, security for costs of appeal, should be paid out to the plaintiff herein, Hume B. Robinson, solicitor for the said appellant.

The defence consists of a general denial of the allegations in the claim; and that I had no jurisdiction to deal with the appeal is also pleaded. At the trial, the facts as alleged in the plaint, and as stated by me above, were proved; but the defendants claim to be embarrassed and confused as to what the plaintiff is really claiming from them, and they build up an argument around the inaccuracy in the order of the 27th October allowing the appeal, wherein the sum of \$1,000 is spoken of as security for costs, whereas it was in reality bail money. On the trial before me, Mr. Lowe appeared as counsel for Mr. Aikman, and Mr. Aikman appeared as counsel for the corporation of Saanich; and, when paragraph 4 is read, I really cannot treat their embarrassment seriously. It is admitted that they received \$1,000. What for? It was paid as bail; and I should think there could be no question that, when the condition of the payment is fulfilled, the money must be paid back to the rightful owner.

The ordinary bail bond provides that it shall be void if the accused appears when required, and does not depart without leave. The same conditions attach to a cash deposit; and, when the appellant appeared before me on the day set for the hearing, she did all that she was required to do; and, when her appeal was allowed, the bail money should have been returned to her. But the defendants say that they are embarrassed and confused by the statements in the plaint, and are not sure what sum of \$1,000 it is that the plaintiff desires to recover, although it is admitted that this is the only \$1,000 that they are aware of having been received by them from Estelle Durlin in any such circumstances. It must be a very trying position for the corporation of Saanich and their legal advisers. They are confused as to what to do with this \$1,000, although they know it does not belong to them; they know they received it from Estelle Durlin;

and they know or ought to know that she or her assignee should get it back; and, although the assignee has demanded it and sued for it, they are still uncertain as to what they should do with it.

If their plea that I had no jurisdiction is good, I cannot see that that helps them, as the circumstances under which they received it are the same. It was not a gift. By what process does it become their property? It would be a monstrous thing if they could not be made to disgorge.

An offer of payment of \$925 was made (and not accepted), as the defendants claimed \$75 as their costs of the prohibition order—as an offset against this is the \$75 item of appeal costs; and, under the circumstances, I will leave this question of costs alone, as the defendants have not made any counterclaim, and have not pleaded tender or paid any money into Court. The plaintiff is entitled to judgment against the defendants for \$1,000. The name in the style of cause of one of the defendants should be changed from the municipality of Saanich to the corporation of the district of Saanich; but, as I do not think the defendants were misled, they are not entitled to any costs of the amendment. The district is generally known as the municipality of Saanich, and on official documents the clerk still styles himself “clerk of the municipality of Saanich,” and uses the seal of Saanich municipality.

It is only fair to the people of the old district of North Saanich to say that the defendant in this action is the district sometimes called South Saanich.

Judgment for plaintiff.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE DRYSDALE, J., IN CHAMBERS.

REX v. ACKERSON.

1. APPEAL (§VIII C-677)—ENFORCEMENT OF AFFIRMED JUDGMENTS—
WARRANT OF COMMITMENT ISSUED BY APPELLATE JUDGE.

Section 150 sub-sec. (e) of the Liquor License Act, R.S.N.S. 1900, ch. 100, which provides that, upon the affirmance on appeal of a conviction thereunder, if it is adjudged by the conviction that the person convicted “shall be imprisoned,” the county court judge hearing the appeal may issue his warrant of commitment, applies only where the com-

mitment imposed imprisonment in the first instance without the alternative of a fine, and the county court judge has no authority to issue a warrant of commitment because of the default of the unsuccessful appellant in paying the fine which the conviction imposed although the conviction provided that in default of payment the defendant should be imprisoned unless the fine were sooner paid.

[*Ex parte Abell*, 33 C.L.J. 626, followed.]

2. COURTS (§ II A 6—179)—JURISDICTION OF COUNTY COURT JUDGE ON AN APPEAL FROM CONVICTION UNDER THE LIQUOR LICENSE ACT, R.S.N.S. 1900, CH. 100, SEC. 149.

A county court judge hearing an appeal from a summary conviction under the Liquor License Act, R.S.N.S. 1900, ch. 100, sec. 149, is a statutory officer and, as such, is strictly limited to the authority which the statute confers.

DECIDED: November 2, 1912.

MOTION on notice to the Judge of the County Court of district No. 1 at Halifax, and the prosecutor the chief inspector of licenses for the city of Halifax, to discharge the defendant under writs of *habeas corpus* and *certiorari* in aid thereto, from the city prison at Halifax, where he was imprisoned under a warrant of commitment in execution made on October 31, 1912, by the Judge of the County Court for district No. 1 at Halifax.

The defendant has been convicted under the Liquor License Act, Rev. Stat. N.S., 1900, ch. 100, secs. 86 and 135 by the stipendiary magistrate of the city of Halifax on July 2, 1912, for unlawfully selling liquor in the city of Halifax by retail, without the license required by law, within six months previous to the date of the laying of the information on June 22nd, 1912, and was adjudged, etc., to pay a penalty of \$50 and \$4.15 costs and in default, etc., sixty days at hard labour unless the said sums and the costs and charges of conveying him to gaol were sooner paid.

He appealed under sections 149 and 150 of the said Act to the County Court for district No. 1 at Halifax, and the appeal was dismissed, the conviction was affirmed and it was adjudged "that process of this honourable Court should issue for the enforcement of the said conviction." The appeal Judge then made the warrant above referred to under sec. 150(e) of the Act, which recited the steps leading to and the conviction made by the stipendiary magistrate, and directed enforcement according to its terms.

J. J. Power, K.C., for the prisoner.

J. R. Johnston, for the inspector.

DRYSDALE, J., in an oral judgment held that the Judge on appeal being a statutory officer was limited strictly to the authority conferred on him by the statute, and as sec. 150(e) of the Act related to a conviction made in the first instance for a term of imprisonment absolute as distinguished from imprisonment to enforce payment of a penalty, his warrant was bad and without jurisdiction, and the prisoner held under it was entitled to be discharged: *Christie v. Unwin*, 11 A. & E. 373, 379, 113 Eng. R. 457, per Coleridge, J., and *Ex parte Abell*, 33 C.L.J. 626, may be referred to.

Prisoner discharged.

[DISTRICT COURT OF MOOSOMIN, SASK.]

BEFORE FARRELL, J.

PAHKALA v. HANNUKSELA.

(Decision No. 1.)

1. **APPEAL (§ III E—91)—SERVICE OF NOTICE OF APPEAL—SUMMARY CONVICTIONS.**

Upon an appeal from a summary conviction the notice of appeal may be served either upon the justice or upon the respondent under Cr. Code 750 (amendment of 1909), but where the respondent is not served, more must be shewn than service upon a person to whom the witness, called in proof of service, had been directed on enquiry for a man bearing the same surname and initials as the justice; the appellant should prove that the person served was the justice who tried the case.

2. **COSTS (§ I—2c)—APPEAL FROM SUMMARY CONVICTION—QUASHING FOR NON-PROOF OF NOTICE—HEARING AND DETERMINING.**

Although Cr. Code sec. 755 applies to authorize an order against the appellant for costs of an appeal not prosecuted or entered only in case a valid notice of appeal has been given from a summary conviction, the Court has power under Code sec. 751 to award costs where the appeal is brought on for hearing, but the defendant (respondent) succeeds in having the same quashed or dismissed upon objection taken that notice of appeal had not been served upon him and that there was no sufficient proof of compliance with an alternative method of service available to the appellant, viz., service upon the trial justice.

[*Ex v. Edleston*, 17 Can. Cr. Cas. 155, disapproved; *Ex parte Prague*, 8 Can. Cr. Cas. 109, considered.]

3. COSTS (§ I—2c)—APPEAL FROM SUMMARY CONVICTION—COSTS UNDER RECOGNIZANCE ON QUASHING APPEAL.

Where the appellant has filed his recognizance in the statutory form on an appeal from a summary conviction he thereby submits to an award of costs against him on the quashing of the appeal for failure to prove compliance with the statutory pre-requisites, and this apart from the power given under Cr. Code 751.

DECIDED: September 7, 1912.

THIS is an appeal from an order of W. T. Blyth, the presiding justice of the peace, dismissing the matter of an information brought before him by the appellant against the respondent.

C. V. Truscott, for appellant.

A. T. Procter, for respondent.

FARRELL, DIST. J.:—This appeal was set down for hearing at the last sitting of the District Court at Esterhazy, and was duly brought on for hearing there. Counsel for the appellant proved that all the preliminary steps required by sec. 750 of the Criminal Code had been properly taken, except as to the service of the notice of appeal. Objection was taken for the respondent that the evidence submitted on that point was not sufficient, and in consequence that I ought to dismiss the appeal. The only evidence as to the service of said notice was that of a witness who deposed that within the ten days required by said sec. 750, he had served upon a man in Wapella, who he was informed was W. T. Blyth, a true copy of the notice of appeal on file herein.

There was no evidence that this Mr. Blyth was the justice who tried the case and from whose order therein the appellant was here appealing, or that he had any connection with it whatever, or that he was ever a justice of the peace. As the appellant had not seen fit to serve the respondent, I held that it was all the more important that the requirements of the above section should be strictly complied with and among other things, that the appellant must prove beyond doubt that he had served the notice of appeal upon the justice who tried this case. This, I held, he had not done, and dismissed the appeal accordingly for

want of jurisdiction, and confirmed the order of the magistrate below. The question of costs then coming up, it was agreed to adjourn the sittings to Moosomin, and argue the question of costs there. This was accordingly done. It was argued on behalf of the respondent that since the amendment of the statutes in 1894, when the words "whether such notice has been properly given or not" were inserted in the sec. 884 (Cr. Code, 1892), now section 755 of the Cr. Code (1906), that the prior decision against the right of the Court to grant costs in such cases were no longer applicable, and that I had jurisdiction to award costs here; that in any event the Court had an inherent jurisdiction to award costs. *Ex parte Sprague*, 8 Can. Cr. Cas. 109; and the notes of the reporter at p. 122, 36 N.B.R. 213; *The King v. Doliver Mining Co.*, 10 Can. Cr. Cas. 405, were cited, together with the following cases in our own Courts: *Rex v. Brimacombe*, 2 W.L.R. 53; *Scott v. Dalphin*, 6 W.L.R. 371; *McNeill v. Sask. Hotel Co.*, 17 W.L.R. 7; where in similar cases to the case at bar, costs were awarded. The usual costs were asked for.

Counsel for the appellant quoted no law or cases as bearing upon the point at issue, but contented himself in pointing out that all the cases cited above were different from the case before us, that in all of these notice had been duly served on the party entitled to receive it, whereas here this had not been done, that my only authority to grant costs was under sec. 755 of the Code, that under that section I only had such a right "upon proof of notice of the appeal to such Court having been given to the person entitled to receive the same" and that as I had held that it had not been proven that the person entitled to receive the notice of appeal had received it, I therefore had no jurisdiction to award costs.

If my only authority to award costs in this case is confined to that given by sec. 755, I am inclined to think that the contention of counsel for the appellant is right, and since I have held that there has been no proof of service of the notice of appeal, I have here no jurisdiction over costs. At the hearing of this appeal I was inclined to consider I was confined to this section

for any jurisdiction I might have in the matter of costs, and on the argument, counsel for both parties seemed to take the same view—but is this so, am I confined to that section? Notwithstanding that some of the cases seem to hold otherwise, there does not seem to be any doubt that in the words of Lord Esher in *London County Council v. West Ham* (No. 2), 61 L.J.M.C. 210; [1892] 2 Q.B. at 174:—

At common law, no Court of common law had jurisdiction to give costs at all, and that the whole power in those Courts to give costs is given them by statute.

This would, I take it, include rules of Court which are founded on statute. In the matter of appeals from summary convictions or orders, four sections of the Criminal Code deal with the question of costs, namely, sec. 751, where the Appeal Court has heard and determined; section 754, where the appeal is heard on its merits, notwithstanding defects in the conviction or order, and sec. 755, where notice has been given and the appeal not prosecuted or abandoned. Each of these sections gives the appellate Court full authority to deal with the question of costs. The fourth section, namely, sec. 760, makes provision on notice for the abandonment of the appeal before the sittings of the Court appealed to, and thereupon the costs of the appeal shall be added to the sum adjudged against the appellant by the conviction or order. The power to grant costs under sec. 755, it has been held in a number of cases, such as *McShadden v. Lachance*, 5 Can. Cr. Cas. 43, *The King v. Ah Yin* (No. 2), 6 Can. Cr. Cas. 63, only applies to cases where the appellant fails to proceed with his appeal and has not abandoned it according to law. In both of these cases the appeals were dismissed for informalities in launching the appeal, and Bole, Co. J., before whom they came, took the above view of sec. 755 and held he had no jurisdiction to award costs. It would appear as if, from the wording of his judgment in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, this was also the view of Landry, J. At p. 118 he says: "Sec. 884 (our present sec. 755) authorizes the Court appealed to to deal with costs when the appel-

lant does not prosecute after having given notice of his intention so to do. The authority, therefore, to impose costs in this case, must be looked for outside of any direct statutory authority." In *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, the appeal had been dismissed because the recognizance was not in proper form. It is to be noted also that all these cases were decided a good many years after this section was amended by the addition of the words "whether such notice has been properly given or not." It seems to me that to take this view of this section puts a limit to it not intended by the legislature and not warranted by the wording of the section itself.

I think there is no doubt that the section was primarily intended to prevent frivolous appeals, and, it is true that the marginal reference to the section is "Costs when appeal not prosecuted," but to confine it to such appeals is going too far and would deprive respondents of much of the benefits, in my opinion, intended by the legislature to be derived from it. The words "and though such appeal has not been afterwards prosecuted or entered" is not in my opinion a condition precedent to the granting of costs, but rather intended to enlarge the scope of the section, and to make clear its wide scope, so that when notice has been given and not abandoned under sec. 760, the Court appealed to has the authority under this section to award costs, no matter how defective the notice may have been and whether the appeal is entered or not or prosecuted or not. Taking this view of this section, I would not have any doubt as to my authority under it to grant costs in the present case, if, however, I did not consider the words of the section I have already quoted, requiring proof of notice of appeal on the person entitled to receive it, to be a condition precedent to the power to grant costs. As far as this case is concerned, I do not see how I can get over those words. The qualifying words of the section, "Whether such notice has been properly given or not," do not affect the question. The question here is not as to whether this notice was properly given or not, but whether any kind of a notice at all was given to the person entitled to

receive it. I have held that there was no proof that such person received it, and dismissed the appeal on that point alone. I therefore hold that in this case I have no jurisdiction to award costs under sec. 755.

It is quite clear that the appeal was not heard and dealt with on its merits under sec. 754, so that this section does not apply. Then as to sec. 751. The first part of this section enacts:—

The Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including the costs of the Court below, as seems meet to the Court.

The authority given by this section over costs largely depends upon the interpretation given to the words "hear and determine." In *Re Madden*, 31 U.C.R. 333, there was an appeal to the general sessions; objection being raised to the notice of appeal, the chairman sustained the objection and dismissed the appeal with costs. On motion to set aside an order for prohibition, Wilson, J., practically held that the words "shall hear and determine the appeal" means "shall decide it on the merits," and therefore as this had not been done the chairman had no power to award costs. The words of his judgment on this point are:—

The question is, what is the meaning of the words "the Court shall hear and determine the matter of the appeal"? They are very similar to those used in the Imperial Act, 3 & 6 Wm. IV. ch. 50, "on hearing and finally determining the matter of such appeal," on which language the Court, in *Regina v. Padwick*, 8 E. & B. 704, declared the sessions had no power to adjudge costs when they dismissed an appeal because they had no jurisdiction to try it, or when the case was disposed of not upon the merits.

The wording of the section of the Act under which this decision was given was the same as that of sec. 751 of the Code quoted above.

Re Madden, 31 U.C.R. 333, was followed in *Regina v. Becker* (1891), 20 O.R. 676. There an appeal had been dismissed because of a defective recognizance with costs. MacMahon, J., in granting the order for prohibition says in his judgment:—

There has been no amendment to the statute since *Re Madden*, 31 U.C.R. 333, in which it was held by Wilson, J., upon the authority of *Regina v. Padwick*, 8 E. & B. 704, that the sessions had no power to award costs on dismissing an appeal for want of proper notice of appeal, holding that the words of the R.S.C., ch. 178, sec. 77 (d) "shall hear and determine the appeal" mean "decide it upon the merits." The respondent's counsel objecting to the recognizance, it was impossible that the appeal should be heard and determined on its merits; and if not so heard, the sessions had no power over costs. See also *Regina v. Recorder of Bolton*, 2 D. & L. 510.

It was argued before me that as the section of the Code corresponding to the present sec. 755 had been annulled by the insertion of the words I have already quoted, these cases are no longer applicable. I do not think that contention is well founded. In neither *Re Madden*, 31 U.C.R. 333, nor *Regina v. Becker*, 20 O.R. 676, was the question ever raised as to the applicability or inapplicability of the section corresponding to said sec. 755 or to the power of the Court to award costs under it, and while in the *Becker* case (*Rex v. Becker*, 20 O.R. 676) the section was as applicable then as it is now in its amended form, as there then was no question as to the notice, the irregularity there was in the form of the recognizance. These cases are the decisions of two Judges of the Ontario Court as to whether when an appeal has been dismissed because of non-compliance with the preliminary statutory requirements to such appeals, the Court could award costs under sec. 751 only. In these cases it was held that the Court had no such authority because the appeals must first be "heard and determined," which was interpreted to mean "decided on the merits." No attempt was made to construe the section corresponding to sec. 755 or to decide what authority, if any, the Court had to award costs under it—the point was not even argued. As against the judgment expressed in the last two cases cited, which in each case is the finding of a single Judge, although a very eminent one, we have the later judgment of the full Supreme Court of New Brunswick, composed of the Chief Justice and four other Judges in *Ex parte Sprague* (1903), 8 Can. Cr. Cas. 109, 36 N.B.R. 213. Here the appeal

had been dismissed because of the insufficiency of the recognizance filed, and the Judge so dismissing it awarded costs to the respondent. The matter came before the full Court on an order *nisi* to quash the said order, on the grounds that the County Court Judge, not having heard the appeal on the merits, had no jurisdiction to award costs, and that part of the order should be quashed.

Re Madden, 31 U.C.R. 333, and *Regina v. Becker*, 20 O.R. 676, were cited on the argument. In the judgment of Landry, J., one of the Judges deciding that case, it may be noted that he says that the judgment of MacMahon, J., in *Regina v. Becker*, 20 O.R. 676, was confirmed by Galt, C.J., and Rose, J. A reference to that case will shew that he is mistaken. There was an appeal to the Divisional Court by the appellant from the judgment of MacMahon, J., but it was only as to the appellant's right to a certiorari. Judge MacMahon's judgment as to the right to award costs was not under review, was not referred to in any way by the Divisional Court, and was not therefore confirmed by them. What they did was to allow a certiorari which had been refused by MacMahon, J., but on other grounds than those argued before him. The unanimous judgment of the Court in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, was that the Judge hearing the appeal had the authority to award costs. In this case all the sections of the Code dealing with the question of costs were taken up and considered, as well as the inherent right of the Court to award costs, differing in this respect from *Re Madden*, 31 U.C.R. 333, and *Regina v. Becker*, 20 O.R. 676, where only one section was dealt with. As I understand the judgment in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, the authority to award costs was decided on two grounds, namely, (a) under sec. 751, and (b) the inherent right of a Court of appeal to award costs, although all the Judges may not have agreed as to both grounds.

Taking the first ground that in such a case as *Ex parte Sprague*, and the case at bar, the Appeal Court has the authority to award costs under sec. 751, it seems to me that this is the true

intention of the legislature when enacting this section. The judgments in *Re Madden*, 31 U.C.R. 333, and *Regina v. Becker*, 20 O.R. 676, as to the interpretation of the words "hear and determine" in my opinion go too far, if I may be allowed to differ from the eminent Judges in those cases. To hold that these words mean the hearing and weighing of the evidence pro and con bearing on the subject matter of the appeal is, it seems to me, to put too narrow a construction upon them. Sec. 754 provides specifically for the hearing of the appeal upon the merits, and it seems to me that if the legislature intended the words in sec. 751 "hear and determine" to mean "hear and decide on the merits," it would have used these words in this section as it has in sec. 754.

In *Regina v. Lynch* (1886), 12 O.R. 372, it was held by Wilson, C.J., that the giving of notice of appeal although the appeal was not afterwards prosecuted, is "appealing." In *Johnston v. O'Reilly* (1906), 16 Man. L.R. 405, Mathers, J., held that "serving notice of appeal is appealing." In *Ex parte Roy* (1907), 12 Can. Cr. Cas. 533, 38 N.B.R. 109, Tuck, C.J., held that when an appeal had been dismissed by the County Court Judge, without dealing with it on the merits, apparently for the want of papers that had been before the justice of the peace, there was an "appealing," and in *Ex parte McCorquindale* (1908), 15 Can. Cr. Cas. 187, it was held by the full Court of New Brunswick that the defendant by giving notice of appeal and afterwards serving reasons for appeal, although the other requirements of the Act do not appear to have been done, had thereby "appealed." In all these cases in consequence of the finding of the Courts that there was in each case an appeal, certiorari was refused. I quote these cases to shew what the Courts have held to be "an appeal," and a sufficient appeal to deprive the appellant from another right he might otherwise have had, because most of the cases refusing to grant costs go on the grounds that in reality there has been no appeal at all. The above cases shew what has been held to be an appeal. If these findings are correct, then, in the case at bar and similar

cases, there is an appeal, and if there is an appeal, it must be heard and it must be disposed of, or, to put it in other words, the appeal Judge must hear it and determine what disposition is to be made of it, and having done so, in my view he has heard and determined the appeal within the meaning of sec. 751, and therefore under that section has the power to award costs. However, whether the argument in this form is sound or not, the judgment of the Court in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213, is not open to such objection. There Hannington, J., as to the interpretation of sec. 751 at 115, says:—

It is too narrow a construction, I think, to say that the matter of appeal is confined to hearing on the evidence or merits of the original conviction; such, I think, was never the intention of the legislature. The matter of appeal is, what is before the Judge, and he can either, on an objection taken to dismiss it for want of a proper bond before hearing on the merits, as is the practice in the Supreme Court, or afterwards on hearing the merits, dismiss or allow it, I cannot conceive how it is possible to suppose that the legislature would intend to provide, if the appellant proceeded rightly and failed, he should pay costs; but if he proceeded wrongly, and neglected to follow the statutory provisions necessary for a successful appeal, he should pay no costs.

He also says at the same page:—

The Judge of the County Court, the notice of appeal having been given, and the case duly entered, had ample jurisdiction to hear and deal with the appeal upon the motion made by the appellant for its hearing and allowance. The case was before him on the docket, and he had to dispose of it.

The learned Judge then found that sec. 751 was applicable.

In the case before us, notice of appeal and a recognizance was filed and the appeal was set down on the docket to be disposed of. The proceedings on file were regular, and the respondent could not safely remain away as he might when on the face of them the proceedings are defective. He could not tell whether or not the appellant would be able to prove conclusively proper service of the notice. As a matter of fact, the appellant had another appeal at the same sittings in which the respondent in this case was the respondent in it also. In that appeal the appellant, profiting by his experience in the case at bar, by

additional evidence was able to prove that the justice of the peace was properly served with the notice of appeal. The appeal here came on to be heard and was strenuously prosecuted and contested at each step, with the result, as I have stated, that I dismissed it for want of proof of the proper service of the notice of appeal. In view of the decision in *Ex parte Sprague*, 8 Can. Cr. Cas. 109, and the reasons I have given, I think I have authority to award costs to the respondent under sec. 751. In addition to that, we have the example of the Court in *The King v. Doliver Mining Co.*, 10 Can. Cr. Cas. 405, and the three cases already cited, where under similar circumstances costs were awarded. The question of costs does not seem in any one of them to have been questioned or argued. They are, however, of value as shewing the practice followed by our own Courts. In the *Doliver* case the notice of appeal had been served on the justice of the peace who tried the case, but had not been served on the respondent, as the Code then required, so that case is on all fours with that I am now considering.

In *Rex v. Brimacombe*, 2 W.L.R. 53, objection was taken to the form of the notice. The report does not disclose whether it was served on the proper party or not, but it seems to indicate that it was not, but that objection was taken to its form before the appellant got that far. Much the same state of affairs exists in the report in *Scott v. Dalphin*, 6 W.L.R. 371; objection was taken there to the notice, because it was only signed by the clerk of the solicitor for the appellant, but the service of the notice does not seem to have been proved. In the *Sprague* case (*Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213) and in *McNeill v. Sask. Hotel Co.*, 17 W.L.R. 7, service of the notice was proved. There is only one other case, I think, among our own reports bearing on this subject, and that is *Rex v. Edleston*, 17 Can. Cr. Cas. 155, 15 W.L.R. 279. There the learned District Court Judge held that under sec. 755 of the Code he

had no jurisdiction to award costs because only one of the two justices, who by statute in that case were required to try it, and had tried it, had been served with the notice of appeal and therefore there was not proper proof that the person entitled to receive the notice had so received it. Here again the question of costs does not appear to have been argued, and the Judge confines himself to sec. 755. With all due deference to the learned Judge, as far as that case deals with the matter of costs, I think he is wrong. The justice who did receive the notice was a person entitled to receive it and to hold that because another person, who was equally entitled to receive the notice, did not receive it, prevents the Court having power to award costs under sec. 755 to the person who appears and contests the motion is, to say the least of it, in my opinion, putting much too narrow a construction on the section. However, I do not think it material in the consideration of the case before us, whether or not there was proof of the due service of the notice of appeal, as it is under sec. 751 I am finding my authority to award costs, and not under sec. 755.

I do not think it is necessary for me here to find as to whether this Court as a Court of appeal from summary convictions and orders, has an inherent authority to award costs outside of any statutory authority. There is a good deal to be said in favour of this doctrine. In *Ex parte Sprague*, 8 Can. Cr. Cas. 109, this point was very carefully considered and the Court there found that there was that inherent right to award costs. Besides the cases cited there, *Regina v. Parlby* (1889), W.N. 190, 53 J.P. 744, and *Mackintosh v. Lord Advocate*, 2 A.C. 41 (H.L. Sc.) also are in point. I confess I have some doubts about the doctrine, and it seems to me that if there is any such right it will be found to rest on some statutory enactment or rule of Court founded on statute.

There is another phase of the matter which has not been raised, but which, I think, is worthy of consideration, and that is, has not the appellant here, by entering into and filing his recognition, expressly given the Court the right to award such costs

as they might consider proper? The condition to the bond filed is that the appellant will personally appear at the sittings of the Court, try the appeal against the order made, "and also abide by the judgment of the Court upon such appeal and pay such costs as are by the Court awarded, then the recognizance to be void, otherwise to remain in full force."

In *London County Council v. West Ham*, [1892] 2 Q.B. 173, Lopes, L.J., says at 176, as to the jurisdiction of the Courts to deal with costs on proceedings in certiorari:—

The only jurisdiction they would have would be under a statute or under the recognizance. There is no jurisdiction by any statute; therefore it follows that the only jurisdiction to deal with costs would be under the recognizance. But then the recognizance only applies where the order is affirmed. If the order is affirmed the successful party obtains costs under the recognizance; if the order is quashed, there are no costs. That was the state of things before the Judicature Acts. In my opinion the Judicature Acts have introduced no change.

And as to the same matter, to quote from *Regina v. Parlbry* (1889), W.N. 190:—

It is therefore by virtue of the recognizance only, and not by virtue of any order of the Court, that the prosecutor had to pay costs if the order which he sought to quash was affirmed. If he succeeded in quashing it, he got no costs because the Court had no original or statutory jurisdiction to grant them.

The recognizance filed here, and required to be filed under sec. 750 of the Code, goes much further than in the case quoted—the costs are not limited as there, to whether or not the appellant succeeds, but here the appellant covenants to "pay such costs as are by the Court awarded." I am of the opinion that outside of sec. 751 I have authority under the recognizance filed herein to award costs. For the reasons given the appellant shall pay the costs incurred by the respondent in defending this appeal; and I order that such costs shall be paid by the appellant within ten days after taxation thereof to the clerk of this Court, to be paid by him to the said respondent.

Appeal quashed, with costs.

[DISTRICT COURT OF MOOSOMIN, SASK.]

BEFORE FARRELL, J.

PAHKALA v. HANNUKSELA.

(Decision No. 2.)

1. WITNESSES (§ V—65)—WITNESS FEES—WITNESS ATTENDING IN ANOTHER CASE.

On the dismissal of an appeal from a summary conviction on which there is a re-hearing, the practice in Saskatchewan does not require that the witness fees of a witness called on such re-hearing shall on taxation be divided because he also attended the sittings on the same day as a witness in another case.

[*Hamilton v. Beck*, 3 Terr. L.R. 405, followed; *Scott v. Dalphin*, 6 W.L.R. 371, considered.]

DECIDED: September 7, 1912.

HEARING of questions arising on the taxation of appellant's costs on the allowance of an appeal from a summary conviction.

C. V. Truscott, for appellant.

A. T. Procter, for respondent.

JUDGE FARRELL:—Upon the question now raised on the taxation of costs as to whether or not the appellant was entitled under the circumstances to tax full witness fees as though there had been no other case at the same sittings on whose behalf they had also attended, counsel for the respondent contends that all the appellant could tax and is entitled to, is one-half of these fees. In support of this contention he cites *Scott v. Dalphin*, 6 W.L.R. 371, a decision of the Chief Justice, but at the same time draws my attention to *Hamilton v. Beck*, 3 Terr. L.R. 405, when the same Judge in a considered judgment on the question held that the successful party and his witness were entitled to their full fees in each case no matter how many causes there were at the same sittings at which they attended for the purpose of giving evidence in them. He contended, however, that this judgment being delivered eleven years before that of *Scott v. Dalphin*, 6 W.L.R. 371, in which the Chief Justice appears to

have taken another view, it may reasonably be inferred that he had since changed his mind on the question. It was also suggested as the case here and in *Scott v. Dalphin*, 6 W.L.R. 371, are really of a criminal character a different practice should obtain than in *Hamilton v. Beck*, 3 Terr. L.R. 405, which was purely civil. As to this last suggestion, I do not think there is sufficient merit in it to warrant me distinguishing between these two cases on that ground.

It was pointed out to me by counsel for the appellant that the Chief Justice in *Scott v. Dalphin*, 6 W.L.R. 371, was not deciding the right of the parties to witness fees under our tariff as he did in the former case, but in making certain deductions from the costs allowed because the respondent was concerned in three other appeals he was merely exercising his discretion in the matter. That, in the case at bar, having awarded costs without exercising my discretion at the time by directing that only a proportional part of the witness fees should be allowed the successful party, I could not do so now. That all I could do now, as the taxing officer, was to decide on my bare order for costs what cost the appellant was entitled to under our rules. In this contention, I think the counsel for the appellant is right. If my attention had been drawn at the time to the state of affairs as they were in this matter, I have no doubt I would have settled the matter when making the order for costs by directing that only a proportionate part of the witness fees should be allowed.

From a perusal of the language used by the Chief Justice in *Scott v. Dalphin*, 6 W.L.R. 371, I think it could reasonably be inferred that he had changed his opinion on the subject since that expressed by him in *Hamilton v. Beck*, 3 Terr. L.R. 405,—for instance, he used the words “he will only be entitled to his proportionate fees for travelling and attendance.” However, I am not prepared here to find that there is any such change of opinion. I think there is no doubt that the English practice is only to allow in such cases as that before us, a proportionate

part of the witness fees, and their tariff schedule expressly provides for this. Under these circumstances, where our own rules and tariff are silent on the point, it is a question if the English rules under section 15 of the Judicature Act would not govern. In Ontario, with whose practice in the matter I am more familiar, the rules and the tariff make the matter quite clear. There before witness fees are allowed, an affidavit must be filed that the plaintiff was a necessary and material witness in his own behalf that he attended for the purpose only, and in no other cause (or otherwise as the case might be) and that the witnesses subpoenaed by him attended in no other cause. Further the tariff provides as in England that where the witnesses attended in other causes, only a proportional allowance of the fees to be taxed.

I would be inclined to think, that such was the proper course here, if I did not feel that the decision in *Hamilton v. Beck*, 3 Terr. L.R. 405, was binding upon me, unless altered as I have suggested by the application of the English rules under section 15 of the Judicature Act. As to that, however, I am not prepared at this moment to express an opinion, because I have not been able to give the point sufficient consideration, and feel I must dispose of the matter now. It is, therefore, with reluctance that I find that in view of *Hamilton v. Beck*, 3 Terr. L.R. 405, the appellant and his witnesses are entitled to their full witness fees in this case.

Order accordingly.

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J., SCOTT, BECK, AND WALSH, JJ.

REX v. EBERTS.

(Decision No. 1.)

1. TRIAL (§ III E 5—261)—HOMICIDE — PROVOCATION TO REDUCE TO MANSLAUGHTER.

Upon a trial of a murder charge the trial judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding.

2. APPEAL (§ VII L 2—477)—REVIEW OF VERDICT—MURDER — CULPABLE HOMICIDE REDUCED TO MANSLAUGHTER.

Where the appellate court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the appellate court in setting aside a conviction for murder or directing a new trial under the Cr. Code 1906, sec. 1019, by reason of the trial judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder.

3. TRIAL (§ V C 2—290)—MURDER—MANSLAUGHTER.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) that he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell."

[Crim. Code 1906, sec. 261, referred to.]

DECIDED: June 22, 1912.

APPEAL by the accused following the refusal of a reserved case to review questions of law arising upon defendant's conviction before Simmons, J., and a jury for murder. The points raised by defendant were as to the alleged insufficiency of the Judge's instructions to the jury as to manslaughter, and as to corroboration of an alleged accomplice.

The appeal was dismissed, Beck, J., dissenting.

J. W. McDonald, for defendant.

P. J. Nolan, for the Crown.

HARVEY, C.J.—The defendant was convicted of murder of a policeman before my brother Simmons with a jury. At the close of the case his counsel took certain objections to the learned Judge's charge to the jury and requested him to reserve a case for the opinion of the Court *en banc* which request was refused and this is an appeal from such refusal.

There are two questions raised in the appeal:—

1. Was the Judge in error in refusing to point out to the jury that they might bring in a verdict of manslaughter?
2. Was he wrong in his directions on the subject of corroboration?

The chief witness for the Crown was one Jasbec who stated that they started out at night to commit burglary, the prisoner taking his, Jasbec's, gun with him, that after making two attempts and being frightened off by some one coming and after he had suggested that they should go home to which he says the prisoner agreed, they moved on somewhere, apparently not for the purpose of going home, when they saw the figure or shadow of a man. Jasbec's evidence to this is as follows, speaking of their leaving Burns' butcher shop when he says in another part of his evidence the prisoner agreed to go home: "Then we made our way around some buildings here (indicating) and finally we came to the lane behind the Imperial hotel. And we came up here and the outlines of the man were somewhere about here (indicating), and we saw him about the same time and Eberts said, 'I'll bet you that that is Jan, he wants to scare us.'" Jasbec's story is that the prisoner then took the gun and said he would go around the building one way and told him to go the other, that though he, Jasbec, twice requested him to go home, the prisoner started round the building, that when the prisoner was out of sight he started for home and then heard a shot when he started to run; that he was soon overtaken by the prisoner running, who just before they reached home told him that he had not seen the man at first when he went round the corner of the building, but that all at once a fellow standing in front of him pointed a revolver at him and said, "What are you doing here, go to hell" and that he then took his gun up and fired at the fellow, that he shot him and he must be dead because he sank down as soon as the shot was fired. without a sound, that he told him also, "I guess it is one of the secret police but I am not sure about it." Mrs. Jasbec states that he told her much the same story and she adds, "He says, 'Good, I kill him right away, it is good that I kill him.' He said that too."

The prisoner gave evidence in his own behalf and denied the story of Jasbec and denied being at the scene of the killing. If his story were true he was innocent, the jury evidently disbelieved it for they found him guilty.

If there was evidence on which they might have found him guilty of manslaughter the trial Judge should have pointed out the distinction between it and murder with reference to such evidence. If, however, there was no such evidence there was no obligation on his part to say anything about manslaughter. This was definitely decided in *Gilbert v. R.*, 12 Can. Cr. Cas. 124, by the Territorial Court and affirmed in appeal by the Supreme Court of Canada; *Gilbert v. The King* (Decision No. 2), 12 Can. Cr. Cas. 124, 38 Can. S.C.R. 284.

It is suggested that the evidence I have quoted shews an abandonment of the burglarious intents, or at least would justify a finding of such abandonment; whether it would or not I cannot see how that would help the case. The story told by him was that he shot the policeman and as pointed out in the *Gilbert* case, the law presumes the intention unless the evidence shews the reverse. The evidence contained in his story and the circumstances of the case is to my mind quite the reverse. The deliberate taking of the loaded gun from Jasbec to meet the man and the statement of satisfaction after indicate a deliberate preparation as well as a practical admission of intention. The facts also shew plenty of ground for motive. The men had been attempting to commit burglaries, some one had appeared and might have seen them. Other burglaries had been committed, then this man is seen who might be the one seen before and who as the prisoners thought, at least afterwards, was a policeman who might have seen them at their work or might arrest them and who might therefore well be put out of the way. It is suggested that there is evidence of a struggle, but all that is pointed out is that a button was pulled off deceased's waistcoat and that the doctor and undertaker subsequently found one of his arms bruised. There are, perhaps, cir-

circumstances which, coupled with others might amount to evidence of a struggle since they might easily happen in a struggle but since they might as easily happen in a thousand other ways they appear to me to have no importance standing alone for any conclusion as to this cause and would not warrant an inference of struggle.

As I pointed out in the *Gilbert* case, [see 12 Can. Cr. Cas. 129, at 132], a jury must have evidence and not hypothesis in which to make a finding of manslaughter. I think, therefore, that there was nothing in the evidence that would have justified a verdict of manslaughter and that, therefore, the learned Judge's charge was unobjectionable in this respect.

On the question of corroboration I have already indicated that Jasbec's wife gives evidence corroborating his. *R. v. Neal* (1835), 7 C. & P. 168, a decision of Parke, is cited as authority for the proposition that the evidence of the wife of an accomplice is not corroboration. I feel no hesitation in saying that I consider such a decision as entirely out of harmony with our present law and views on the subject of evidence and of the present authority. There is, however, much other evidence corroborating Jasbec and implicating the accused though it is by no means far from doubt that Jasbec was an accomplice whose evidence required corroboration, the learned Judge, however, resolved this doubt in the prisoner's favour. He also very carefully directed the attention of the jury to the interest of the wife in confirming her husband's story, as was proper. He also carefully reviewed the evidence corroborating Jasbec in collateral facts and, if, as suggested, the jury might thereby have thought that the evidence of Jasbec in such points required corroboration it would not be because of the way the direction was given and it would, in any event, have been entirely to the benefit and in no way to the prejudice of the prisoner.

As in my opinion this ground of objection is also untenable the appeal should be dismissed.

SCOTT, and WALSH, JJ., agreed with HARVEY, C.J.

BECK, J. (dissenting):—This is an appeal from the refusal of Simmons, J., to reserve certain questions for the decision of this Court. I propose to deal with one only of these questions because in my opinion it is one which ought to be answered in favour of the prisoner and entitles him to a new trial.

The question is, whether the learned Judge erred in directing the jury that, in view of the evidence there were only two possible conclusions they could come to—a verdict of guilty of murder or a verdict of not guilty, thus excluding a verdict of manslaughter, having regard, of course, to the grounds of the direction.

I summarize as much of the evidence as seems necessary for the consideration of this question: The deceased, Willmet, a policeman in the R.N.W.M.P. came to his death in the early morning of Sunday, the 12th of April, 1908, at Frank, Alberta. The prisoner and one Jasbec were living together with their families in a shack in Frank. It is almost entirely upon the evidence of Jasbec that the most material facts depend. These men and also one Jan Jakubsick were miners who at the time were out on strike. Their money had run short. It appears that the prisoner and Jakubsick had on a number of previous occasions committed theft by breaking into stores to procure provisions, and Jakubsick was in the mind to continue in this course. Eberts and Jasbec both kept firearms in their possession. Jakubsick also probably did. At all events there is evidence that he was in the disposition to commit murder if it would serve his purpose. On Saturday afternoon there was talk between the prisoner and Jasbec, during which the prisoner borrowed the prisoner's double-barrelled shot-gun, saying he wanted to go hunting. Later the prisoner told Jasbec that they would go out that night and get provisions by stealing. The two went to bed together in the kitchen of the shack—they had been in the habit of sleeping together there. During the night the prisoner awakened Jasbec and told him it was time to go. They

both got up. The prisoner loaded the gun. Jasbec asked him what he wanted with the gun, and the prisoner answered, "I always like to have something to defend myself with." Jasbec explains:—

I thought that he took the gun along if a dog attacked him because he told me previously that he had tried to break into a hotel at Coleman and he got scared away by a bull dog.

The shack was on the outskirts of Frank. They went into the town to the C.P.R. depot—passed the waiting room and went to the freight shed. The prisoner gave Jasbec the gun and said, "Hold the gun," and tried to get into the window of the freight shed. Jasbec then saw a man in the direction from which they had come and told the prisoner. Jasbec says: "He said, 'Oh, that is another smart fellow going to get his stuff' "—by which I understand another man out for the purpose of stealing provisions—"and I said, 'Come let us go,' and he said all right, and we went away from there and followed the track to the bridge." They crossed the bridge, waited a short time, and then returned and came down by the Frank hotel and Jasbec says, "I told him we had better go home." Then they went behind the buildings facing on the Main street of the town, going in the general direction from which they had come when starting out from their shack. They came to the back of the Burns' butcher shop. The prisoner tried to get into the back door of the shop using a screwdriver. Jasbec says:—

I was standing on the side and I was uneasy and I said, "Come on home," and he said, "Just wait a second, I have got to put the screws back."

They proceeded and came to the lane behind the Imperial hotel. They then both saw the outlines of a man. The prisoner said, "I'll bet you that is Jan" (Jakubsick). It appears that Jakubsick and the prisoner had been out together on previous occasions on similar expeditions. Jasbec says:—

The man disappeared here behind the buildings as far as we could see. He (the prisoner) said, "I'll bet you that is Jan, but I want

to find out who it is," and I said, "Leave it alone and come home" and he took the gun at the same time and he went in behind here. He took the gun off me and he said, "I will go round this way and you go round that way," and I said, "We had better go home" and he went round one way and I went the other and I stopped here and finally when I thought he was far enough round the corner I went off in this direction. . . . Eberts said, "You go back around this way and we will see who it is."

The building spoken of is a small building on the lane in the rear of the Imperial hotel, an ice house. Jasbec continues:—

I started on the way home and I made a few steps when I heard a shot fired. . . . I heard a shot-gun and the first thing I thought the shadow that we had seen had shot at Eberts and I started to run and I ran a distance, I do not know how far it might be—it might be 25 yards and it might be 50 yards—I am not sure about that, when Eberts followed me up and he joined me.

At another place Jasbec says, "I waited a little and I started to go off home and when I had made a few steps I heard a shot going." Jasbec says the shot came from the direction in which he supposed the prisoner was, that when the prisoner joined him he (the prisoner) had the gun in his hand; that they both ran on to close to the prisoner's shack.

Jasbec continues:—

And then I asked him what is the matter; and he said: "When I come around that corner first I saw nothing: all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here? go to hell'; and I thought he drewed his gun up and I fired at him."

Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him . . . and I said what became of him? And he said he shot him, he shot the fellow and he must be dead because he sank down as soon as the shot was fired without a sound. . . . He (the prisoner) said: I guess it is one of the secret police but I am not sure about it.

I note some other portions of Jasbec's evidence:—

Q. When did you first know that the man who had been killed was a policeman? A. On the Sunday morning, when Jakubick (who had been down town) told us he had seen him.

Reverting to the time of their being at Burns' butcher shop Jasbec's evidence on cross-examination is:—

Q. And then you got faint-hearted and started for home; is that not

correct? A. I always said to him, "Let's go home," since we started—first started.

Q. Why didn't you go home the regular trail? A. Because I did not like to go through the town. . . .

Q. When you left Pat Burns (the butcher shop) which way did you go? You wanted to get home—that was your intention, to get home?

A. Yes, round here. . . .

Q. When you told Eberts that you had better go home, Eberts agreed to go? A. Yes.

Q. And he put the screws back in the door? A. Yes.

Q. And you started for home? A. Yes.

Q. And he agreed to do that? A. Yes.

The evidence shews that Willmet, the deceased, was dressed in civilian's clothes, that when found his condition was that he was lying on his back, had a gash on the right side of his neck, that his shirt was torn, presumably by the discharge of the shot-gun and that there was a pool of blood soaked into the ground at the right side of his neck and some blood on his right hand and that there was a small calibre revolver lying by his side, about six inches from his hand—(the revolver was identified as that of Sergeant Hazlett, Willmet's superior non-commissioned officer) that the top button was torn off Willmet's vest. According to the judgment of Dr. McKenzie, who examined the body shortly after death, the shot was fired at a distance of ten or twelve feet. The undertaker, Addison, when preparing the body for burial found two marks upon it, which appeared not to be the result of the shot, namely—"a little square mark on the shoulder, which covered an inch square exactly, not a wound, more like a bruise, the skin was knocked loose, the skin was not gone off but it was loose though, and there was a little bruise right on the forearm."

Upon this evidence and some admitted facts which I have not yet noted, it seems to me that the case might have been put to the jury in this way:—

A very large portion of the population of Frank is composed of miners, a very rough class of men of many nationalities. All these men—several hundreds in number—were out "on strike." Their food supply was running short. Many bur-

glaries had taken place in the town without doubt committed by miners by way of providing themselves with food. They were a rough lot who kept firearms in their houses and carried them on these expeditions. Eberts was one of this class and on the night in question was out, accompanied by Jasbec, for the purpose of burglary and carried a firearm for the purpose—let it be admitted of use in effecting his escape in case of discovery. Eberts having made an attempt at the C.P.R. freight sheds, desisted on seeing a watchman. Having made another attempt at Burns' butcher shop, Eberts again desisted, not owing to fear of being surprised, but to the persuasion of Jasbec, who urged him to come home, which he expressly agreed to do and shewed his real intention of doing by placing the screws in the door. They both then proceeded in a direction which though not in a direct line to their home, was in that general direction and the detour, which was not great, is accounted for by their wishing to keep in the shadow of buildings. Passing in the neighbourhood of the Imperial hotel, Eberts sees—and no doubt he could see for a considerable distance—the shadow of a man in the rear of the hotel. He really thought it is Jan Jakubsick whom he knows well and who seems to have been an unscrupulous desperado. He may have feared that, contrary to his expectation, it would turn out to be another equally unscrupulous desperado whom he might not know and therefore took the gun with him. He came close to the man Willmet, whom he took to be a civilian and whom he did not know. Something occurred there, to which there were no witnesses except Eberts and Willmet, which resulted in Eberts shooting Willmet. There is clear evidence in which the jury could reasonably find that at the time Eberts caught sight of Willmet, he had abandoned his intention of committing any indictable offence on that expedition. There is evidence of a struggle between Eberts and Willmet in the torn skin on the shoulder and the bruise on the forearm of Willmet. The length of time indicated by Jasbec was more than sufficient for a mere

meeting of the two men and quite sufficient for a short struggle. Apart from the two men getting into an altercation there was no motive for Eberts shooting Willmetts, whom it may be supposed he still took to be a civilian—for after it was all over he only suspected him to be a policeman. There was something in the way of a threat by Willmetts.

His expression was not the common one "Get to hell out of this," which means, "Go away," but "Get to hell," which may have been intended and taken to mean "I'm going to send you to hell." There is no confirmation of the evidence of Jasbec of what took place at this the crucial point of his story and little reliance can be placed upon it. With the evidence of Eberts' abandonment of his intention to commit any indictable offence; with the absence of motive on his part for a deliberate killing of Willmetts; with the evidence of his not knowing Willmetts to be a peace officer; with the evidence of a threat on Willmetts' part; with the evidence of a struggle; with a hesitancy to accept Jasbec's story, it seems to me that a jury might not unreasonably have found a verdict of not guilty.

But if so, it seems to me that they were not properly directed by the learned Judge, inasmuch as he made no reference in his charge to any of these points which I have enumerated, but in effect told the jury that if they disbelieved Eberts' story—in which he set up an *alibi*—and believed Jasbec's story they had no alternative but to find Eberts guilty of murder.

It is said, however, that the only question open for our consideration is whether the learned Judge was right in excluding the possibility of a verdict of manslaughter. This may be so, but the points which I have enumerated are not, I think, compatible only with a verdict of not guilty but are, I think, compatible with a verdict of manslaughter. If it would have been not unreasonable for a jury to find a verdict of not guilty, it seems to me that it would equally have been not unreasonable for them to find a verdict of manslaughter on the ground of want of motive for deliberate killing, the threat, the struggle,

the consequent arousing of sudden passion and provocation; for the facts enumerated do not tend to establish a case of self-defence or accident rather than a case of a struggle, brought about, if you wish by the prisoner, in which provocation was given and sudden passion aroused excluding malice. In *The Queen v. McDowell*, 25 U.C.Q.B., at p. 115, it is said:—

By the light of modern authority all questions as to motive, intent, heat of blood, etc., etc., must be left to the jury and should not be dealt with as propositions of law.

In *Regina v. Brennan*, 27 O.R., at p. 674, MacMahon, J., says:—

It is unnecessary that I should refer at length to the charges of other eminent Judges, as shewing the care (I might also say solicitude) evidenced by them, when the evidence disclosed that an assault had been committed in leaving to the jury the question whether the assault was of such a character as should have furnished provocation, and that the mortal wound was given so recently after the provocation as to reduce the killing from murder to manslaughter. The following cases may be referred to: *Reg. v. Kirkham*, 8 C. & P., at p. 115; *Regina v. Sherwood*, 1 C. & K. 556; *Regina v. Smith*, 4 F. & F. 1066.

I would direct a new trial.

Appeal dismissed; BECK, J., dissenting.

[SUPREME COURT OF CANADA.]

BEFORE SIR CHARLES FITZPATRICK, C.J., AND DAVIES, IDINGTON,
DUFF, ANGLIN, AND BRODEUR, JJ.

EBERTS v. THE KING.

(Decision No. 2.)

1. TRIAL (§ III E 5—261)—HOMICIDE — PROVOCATION TO REDUCE TO MANSLAUGHTER.

Upon a trial of a murder charge the trial judge is justified in not submitting the question of manslaughter to the jury where there is no more than mere surmise or conjecture on which to rest such a finding.

[*R. v. Eberts* (No. 1), 7 D.L.R. 530, affirmed.]

2. APPEAL (§ VII L 2—477)—REVIEW OF VERDICT—MURDER — CULPABLE HOMICIDE REDUCED TO MANSLAUGHTER.

Where the appellate court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the appellate court in setting aside a conviction for murder or directing a new trial under the Cr. Code 1906, sec. 1019, by reason of the trial judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder.

[*R. v. Eberts* (No. 1), 7 D.L.R. 530, affirmed.]

3. TRIAL (§ V C 2—290)—MURDER—MANSLAUGHTER.

Upon a trial for murder, upon a request for a charge of manslaughter upon the alleged ground that the accused shot the deceased while "in the heat of passion caused by sudden provocation," the charge was properly refused where nothing was said in the evidence as to the accused having been aroused to a heat of passion and the circumstances were, in the view most favourable to the defendant: (1) that he was on the scene with the criminal intent to steal; (2) that he believed the deceased to be a secret police officer; (3) that the only provocation suggested by the defence was that such officer came up to the accused at a place where he was lurking under circumstances justifying suspicion and thereupon pointed a pistol toward him and told him "to go to hell."

[*R. v. Eberts* (No. 1), 7 D.L.R. 530, affirmed; Crim. Code 1906, sec. 261, referred to.]

DECIDED: October 7, 1912.

AN appeal by Fritz Eberts from the judgment of the Supreme Court of Alberta *en banc*, Beck, J., dissenting, refusing to grant a new trial to the appellant who had been convicted of murder.

Judgment was rendered on the 7th of October, 1912, by which the appeal was dismissed, Duff, J., dissenting.

J. W. McDonald, and *Colin MacLeod*, for the appellant.

E. F. B. Johnston, K.C., and *W. M. Campbell*, for the Crown.

FITZPATRICK, C.J.:—I concur in the opinion stated by Mr. Justice Idington.

DAVIES, J.:—This is an appeal from the judgment of the Supreme Court of Alberta, sitting *en banc*, refusing, Mr. Justice Beck dissenting, to grant a new trial to the prisoner who had been tried and convicted of murder.

The application for a new trial was based upon the conten-

tion that the trial Judge should have instructed the jury that if they believed Jasbec's account of the shooting as detailed to him by the prisoner immediately after it took place, it was open to them to find the prisoner guilty of manslaughter only, but that the trial Judge had charged the jury they were bound either to acquit the prisoner altogether or find him guilty of murder.

Article 261 of the Code reads as follows:—

Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

The question argued before us and which we are asked by the prisoner's counsel to decide in the affirmative, is whether, under the evidence given by Jasbec, of the conversation he had with the prisoner immediately after the latter shot the deceased, it was open to the jury to reduce the crime with which the prisoner was charged from murder to manslaughter.

No such contention was made with respect to the conversation given in evidence by Jasbec's wife. From her version one of two conclusions would have to be drawn, either that in shooting the deceased as and when he did the prisoner was guilty of murder, or that he shot deceased in self-defence and should be acquitted. It would not be possible for counsel successfully to contend, under Mrs. Jasbec's version of the prisoner's statement of the shooting, that a verdict of manslaughter could be rendered.

But counsel did not contend that on Jasbec's version of prisoner's statement the jury might have found him guilty of manslaughter only. I do not think so. I do not think in the first place that it was open to the jury on the evidence to find that the prisoner had abandoned the criminal intent to steal with which he started out that night. It might be possible for some such finding to be made with regard to Jasbec himself. Both during the unsuccessful attempt to break into Burns' store, and afterwards, while they were standing in the street in the rear of the bank, Jasbec suggested to the prisoner the abandonment

of the criminal enterprise which they had jointly entered upon and a return home. He further said that when the prisoner took the gun from him and went away with it with the object of meeting the man whose shadow they had seen, he made up his mind to return home. But there was no evidence justifying any such finding as regards the prisoner.

Then as to the fact of the deceased who was shot being a secret police officer and believed by the prisoner to have been such when he shot him, I cannot see where there can be any doubt. The prisoner said to Jasbec just after the shooting, and while they were returning to their shack, that he guessed the man he shot was one of the secret police but was not sure of it. Probably not, absolute certain knowledge he hardly could have had, but he *believed* the man was a secret police officer.

The only "provocation" suggested was that stated by the prisoner to Jasbec that the man who he guessed was one of the secret police found him at the time of night and in the place he did and pointing a pistol towards him told him to go to hell. Nothing at all is said about the prisoner being aroused to a "heat of passion" by the action of the police officer. Not a word from which any such state of mind could be inferred. On the contrary, the prisoner told Jasbec that he raised the gun he carried and shot the man dead. Looking at all the circumstances and facts surrounding the unfortunate shooting of the officer as detailed in the evidence, I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."

I think, reading the charge of the trial Judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial. I think the judgment of the Court below was right and that the appeal should be dismissed.

IDINGTON, J.:—The appellant and one Jasbec, being engaged about one or two o'clock a.m., in a joint expedition for purposes of stealing in Frank in Alberta, at a time when the miners were on strike, carried with them a gun, and having tried several places unsuccessfully, saw a man or shadow of one at some distance. The appellant got the gun from Jasbec and started with it to find out who the man was, suggesting it was possibly an acquaintance come to scare them. He went one route or direction and Jasbec another as agreed between them. Jasbec tells this story and proceeds to say he concluded to go home and had gone some short distance when he heard a shot fired and in a few minutes heard running behind him the appellant with the gun. Then both ran till near appellant's shack.

The following evidence of Jasbec contains the story as there and then recited by appellant:—

Q. Did you have any talk with him? A. And then I asked him what was the matter. And he said, "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here, go to hell,' and I thought he drew his gun and fired at him."

Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it? What was next said by either of you after that? What was next said? Did you ask him anything then? He said he drew his gun and fired at him? He said he drew his gun up and fired at the man? A. And I said, "What became of him?" and he said he shot him—he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time? A. Yes.

Q. What did he say? A. He said, "I guess it is one of the secret police but I am not sure about it." That is what he said.

The appellant gave evidence on his own behalf and denied this whole story of Jasbec and declared he had never been out of his house on the night in question.

The story of Jasbec so fitted into the surrounding facts and circumstances as to corroborate it and was so supported by evidence of others that there could be no doubt of appellant

having shot one of the secret police found dead next morning with a pistol near his dead hand.

The contention set up is that it might have been the result of a quarrel or such other facts and circumstances as would, in law, have reduced the culpable homicide from murder to manslaughter.

The learned trial Judge refused to countenance this claim when counsel for the accused asked him to direct the jury that under such facts as in evidence, the offence *must*, if committed, be taken to be manslaughter. He directed the jury that there did not seem to be any ground for a verdict of manslaughter and it seemed as if there must be a verdict of guilty of murder, or not guilty.

The Court of Appeal dismissed an application made to it on this and other grounds. Mr. Justice Beck dissented, holding that the jury ought to have been directed as to what would constitute manslaughter, and to consider whether or not, if the accused were guilty of anything, a verdict of manslaughter might not be the proper verdict.

It seems to me the learned trial Judge and the majority of the Court were right in the view taken by them.

To reduce culpable homicide to manslaughter requires, in the class of manslaughter cases suggested herein, evidence of roused passions.

The man whose passions we are asked to find might have been so roused, has by his own oath denied the fact and left in his unsworn story nothing to rest such a finding upon. Moreover his remarkable career as told by himself seemed to demonstrate that he was hardly the sort of man to be roused to passion by the sight of a revolver or the sound of rough language. Indeed the language he used in relating this incident now in question to Mrs. Asbec slightly varies from above and indicates he felt bound to shoot or was proud of having shot first.

There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible.

The discarding or overlooking such a defence to a charge of killing a man he knew or believed to be a policeman, properly armed to deal with midnight prowlers carrying guns is hardly a case where we can, in the language of section 1019, find that "substantial wrong or miscarriage of justice" entitling us to interfere.

A verdict of that kind in such a case would have been a travesty of justice and made of the administration of the law a farce.

No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial Judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

It might have been argued in such a case, but it was not in this, that a man faced with a revolver was put in fear of his life, and therefore shooting first was entitled to an acquittal. But where a case of manslaughter, which is supposed to fall within what section 261 of the Criminal Code defines, can find place under the very peculiar circumstances of this case, I am at a loss to understand.

If the learned trial Judge had been asked to direct an acquittal on the ground that the man having reasonable apprehension of death or grievous bodily harm, had taken the life of another, he should have explained the law bearing on the subject and left that to the jury.

True the surrounding fact and circumstances would not have seemed a very promising foundation to dwell upon such an issue, but it was the only possible issue that could have been raised on such facts as put in evidence.

The appeal should be dismissed.

As a matter of courtesy due to a man on an appeal for his life we heard argument about want of corroboration, which, I submit, needs no further observation than this: The gun found with the prisoner, the wad fitted for it found in and with the body of the deceased and a mass of evidence that connected ap-

pellant therewith (quite independent of Jasbec and his story), if well marshalled and fitted together and carefully considered might have spared us that argument.

But I may add that it is doubtful if anything except the only point upon which a judicial dissent in the Court below appeared in judgment can be brought here.

DUFF, J. (dissenting):—I think there should be a new trial because it appears to me that the effect of the learned trial Judge's charge was to withdraw from the jury evidence which ought to have been considered by them and which, if considered by them might not improperly have influenced them favourably to the prisoner in arriving at their verdict.

The main facts are stated in the judgments in the Court below and I shall refer to them only in so far as is necessary to a clear apprehension of the ground upon which I think the verdict should not be permitted to stand. The prisoner was convicted of murder. The homicide occurred at Frank, Alberta, on the 12th April, 1908. The trial took place four years afterwards in April, 1912. The chief witnesses as against the accused were one Jasbec and Jasbec's wife. Jasbec says that on the night in question he and Eberts set out from a shack on the outskirts of Frank intending to get food by stealing. That abandoning a projected attempt on the C.P.R. freight sheds and a partly executed plan of entering Burns' butcher shop they gave up the expedition and started for home. On the way home noticing the outlines of a man near the Imperial hotel who seemed to disappear "behind the buildings" Eberts (so Jasbec's story runs) said, "That I bet you is Jan" (meaning a common companion Jabusick with whom they had been out before on similar expeditions), "give me the gun and I will go and see who it is"; and they separated, Eberts taking Jasbec's shot-gun and setting out towards the figure they had observed while Jasbec proceeded on his way homewards. Shortly afterwards Jasbec says he heard a shot fired, the sound appearing to come from the direction in which Eberts had gone. Later Eberts

joined him and they reached their shack together. The next day the unfortunate deceased, a constable of the R.N.W.M. Police, was found in the vicinity indicated by this evidence, obviously killed by a discharge from a shot-gun. These facts and the evidence given by Jasbec and Jasbec's wife of statements made by Eberts constitute the substance of the case made by the Crown against the accused. The accused gave evidence in his own behalf and his defence was an alibi. The learned trial Judge in effect instructed the jury that if they believed Jasbec's story in its substantial features shewing that the prisoner was the author of the homicide, then they had no alternative but to convict him of murder.

The following passages give the substance of the charge so far as material:—

But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect; *that when a person goes out to commit some indictable offences such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof and death ensues from such injury, that would be murder.* So that you see a person might be guilty of murder in that sense, although he may not have had a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.

It has been pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always, under our administration of justice, a presumption that a man is innocent until he is proved guilty, that is modified by another rule of evidence—*that there may come a time when the inculpatory facts may be so numerous and so strong in their bearing that the onus shifts on to him, then. That was really the form which this trial took.* You had the evidence of a confessed accomplice in the burglary and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness-box and has told a story.

He has said that on the night in question he was drunk; he does not

remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife, and his wife says the same thing.

You have heard the whole of the evidence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shot-gun of Jasbec's was taken with them and that that was the instrument which caused the death of the policeman Willmott, then you will consider that in relation to the explanation I have given you as to the law which applies to people who go out and commit an indictable offence and take firearms with them and kill a man either in effecting the purpose of committing that offence, or in trying to escape.

I am bound to say to you and instruct you that there seems to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty. I cannot see where you could consider the question of manslaughter at all in view of the statement of Eberts himself.

It will be your duty then, having regard to the explanations I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because if it is there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you, namely, to find a verdict of guilty against him, that is, if Jasbec's story, that they started out and went to the C.P.R. freight sheds first and then went around by P. Burns' store and then around behind the Imperial hotel and that they had a gun with them and that the accused asked for the gun and got it at the time they saw the shadow or what they thought was the shadow of a man and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot then—leaves it in the position that if Jasbec's story is substantially true in regard to these important features of the happenings that night—then there is no alternative for you but to bring in a verdict of guilty.

The Court:—The rule was well known, and has been explained by me to the jury, that if they believe beyond a reasonable doubt as reasonable men using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters—using that common sense—if they as reasonable men believe that the story told by Jasbec is the true one there is no alternative for them but to bring in the verdict I have indicated—the verdict of

guilty; if they have a reasonable doubt as to the truth of that story so far as it implicates Eberts they will give Eberts the benefit of that reasonable doubt.

It cannot be doubted that from these passages the jury would take the view that their sole task was to decide whether they should believe Jasbec's story in so far as it was concerned with the incident related by the learned Judge himself and if they did so it was their duty to find a verdict of guilty.

I shall presently call attention to the passages in the evidence of Jasbec and his wife which I think the jury ought to have been asked to consider, but in the meantime, it is convenient to observe that the charge of the learned trial Judge seems calculated to mislead the jury in the important point of the burden of proof. The onus was on the Crown to establish the guilt of the prisoner to produce evidence, that is to say, which should satisfy the jury beyond any real doubt that the prisoner was guilty of murder. It is quite true that the proof of homicide alone by the prisoner might constitute a *prima facie* case and a very strong *prima facie* case against him. But if in proving the homicide evidence of its circumstances and incidents was given of such a character as properly to raise in the minds of the jury a real doubt as to the prisoner's guilt it would then be their duty to acquit.

In criminal cases (it is needless to observe) the degree of certitude at which a jury must arrive before it might find the issue of guilty or not guilty against the accused is higher than that which depends upon the application of the criterion of the preponderance of evidence or balance of probability applied in civil cases. As to the onus of proof, in *Rex v. Stoddart*, 25 Times L.R. 612, the principles applicable in criminal trials are stated in these words (at p. 617):—

It seems to the Court that the jury ought to have been told that the prosecution having given *prima facie* evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if upon a review of the whole of the evidence they were satisfied that the prosecution had made out

the case that the defendant Stoddart was a party to the conspiracy they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the Court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the Court is of opinion that there was a substantial misdirection.

The learned trial Judge seems (as appears from the extracts quoted from his charge) to have thought that if the jury were once convinced that the prisoner was the author of the homicide that was the end of the case because evidence of facts justifying his act or reducing his crime to manslaughter must come from the prisoner alone. That, of course, was equivalent to withdrawing from the jury all the circumstances disclosed by the evidence of Jasbec or Jasbec's wife bearing upon the degree of culpability which ought to be attached to the prisoner's act assuming the homicide to have been his act.

Before going into that evidence (of Jasbec and his wife) there are two material observations.

1st. The prisoner's statements to these two witnesses having been put in evidence by the Crown they became evidence in his favour as well as against him. In *Rex v. Higgins*, 3 C. & P. 603, Parke, J., said:—

Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

It was for the jury to say how much of the prisoner's statement they accepted as true, but the Crown having offered the

statement and got it before the jury it was the duty of the jury to consider the statement as a whole and the consideration of it as a whole could not properly be withdrawn from them; 2nd, it was for the jury to say how much they were to believe of the accounts which Jasbec and his wife gave of the prisoner's statements to them. They might believe parts of those accounts, reject other parts.

The jurors are not bound to believe the evidence of any witness; they are not bound to believe the whole of the evidence of any witness. They may believe that part of the evidence of a witness which makes for the party who calls him and not believe that part of his evidence which makes against the party who calls him: Lord Blackburn, *Dublin v. Slattery*, 3 A.C. 1155, at 1201.

The point I have to discuss is whether on any reasonable view of the evidence of Jasbec and his wife (bearing in mind these principles) the minds of the jury might, under proper instruction from the Court, have been brought into a real state of doubt as to the guilt of the prisoner. Mrs. Jasbec's account of Eberts' statement is as follows:—

Fritz Eberts said he was out with my husband that night but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, "*Go to hell*" but he came before and he shoot.

Q. Who shoot? A. Fritz Eberts shoot.

Q. Shoot who? A. Shoot the policeman.

Q. Do you remember anything else? A. He says, "Good, I kill him right away—it is good that I kill him," He said that, too.

Q. Is there anything else you remember? I know it is a long time ago. Did you have any other conversation with Eberts and his wife, when they were together, or was that the only time? A. That was the only time.

Q. That was the only time Eberts spoke to you about the policeman?

A. Yes.

Q. That was on the Sunday that you heard of it? A. Yes.

Q. And had you already heard that the policeman was killed at that time or not? A. Yes, I heard it all right.

Jasbec's account is this:—

Q. Did you have any talk with him? A. And then I asked him what is the matter. And he said, "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he

pointed a revolver at me and said 'what are you doing here, go to hell,' and I thought he drew his gun up and fired at him."

Q. Who did? A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it? What was next said by either of you after that? What was next said? Did you ask him anything then? He said he drew his gun and fired at him? He said he drew his gun up and fired at the man? A. And I said, "What became of him?" and he said he shot him—he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time? A. Yes.

Q. What did he say? A. He said, "I guess it is one of the secret policemen, but I am not sure about it." That is what he said.

I shall assume for the moment that this evidence was evidence which the jury ought to have considered. On that assumption the trial Judge would, of course, have instructed the jury that the first question to which they ought to apply their minds was how much of these two conversations really occurred, how far are these statements attributed to Eberts to be ascribed to him? Both witnesses were speaking of conversations which had occurred four years before. Jasbec himself had been under arrest for five months and having regard to the suspicions naturally attaching to him (it was his gun, it will be remembered, from which the shot was alleged to have been fired) a jury would be acting wisely in examining his testimony with critical care, even with suspicion, and no lawyer would, of course, dispute that the question of what Eberts did really say in the course of these conversations was a question exclusively within the province of the jury. Did Eberts, for example, say to Jasbec, "I guess it is one of the secret police"? Did he in talking to Mrs. Jasbec express satisfaction in having killed a police officer? At the preliminary hearing, Mrs. Jasbec had not recalled this part of the conversation. It is quite within the bounds of reasonable possibility that the jury may have rejected this part of the story altogether or may have felt it to be of too doubtful credit to be acted on with safety in a capital case. Assuming them to have reached that conclusion, let us

examine the effect of these statements in the light of the other evidence placed before the jury by the Crown, to see if there is any substantial foundation in them for the suggestion that the prisoner acted under such provocation or such reasonable fear of harm as to make it proper that the jury's attention should be directed to them.

There was, I may repeat, abundance of evidence from which the jury might have reached the conclusion that when they saw the figure of the man who was shot they had abandoned their criminal project and were on their way home. However, little such a conclusion may commend itself to one's own judgment, Jasbec's own evidence is perfectly clear upon the point and Jasbec had been put forward by the Crown as a credible witness. In his cross-examination, p. 405, he says:—

Q. When you told Eberts that you had better go home, Eberts agreed to go? A. Yes.

Q. And he put the screw back in the door? A. Yes.

Q. And you started for home? A. Yes.

Q. And he agreed to do that? A. Yes.

This is entirely consistent with the testimony given by him on his examination in chief. Again, his evidence is precise to the effect that Eberts thought the man they had seen was their friend Jan. If the jury accepted this part of Jasbec's testimony the situation they would have to consider was this: Eberts in these circumstances setting out to accost his friend Jan suddenly meeting a stranger who, to use the language of the wife, "takes a revolver and put it right in his face" and Eberts shooting. These are the bald facts presented by this story; but there is a little more. Mrs. Jasbec's report of Eberts' words is this:—

Fritz Eberts said he was out with my husband that night but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say "Go to hell," but he came before and he shoot.

There can be no possible doubt that if the jury believed these words to have been used by Eberts they were entitled to and they would regard them as indicating that Eberts acted in response to and in defence against a sudden assault with a

pistol. A good deal was made on the argument of the exclamation "Go to hell." But the effect of such an exclamation upon a man in Eberts' position would depend wholly upon the attitude of the person uttering it, and it is to be observed, moreover, that Jasbec admitted upon cross-examination that it was not until after he had told his story to the police that he recalled the use of this expression. The jury might very well in the circumstances consider this part of the evidence to be negligible. The fact, it may be added, that there were lawless, not to say desperate men about is a circumstance which weighs as much at least in favour of the suggestions made on behalf of the prisoner as against him.

Weighing all the relevant considerations I am unable to convince myself that a jury properly instructed might not reasonably have taken a view of this evidence which would afford a foundation for real doubt as to the propriety of convicting the prisoner of the capital offence. I take it to be indisputable that where a homicide follows instantaneously upon acts which may be a sufficient provocation to take the act of the accused out of the category of murder it is a question of fact for the jury to say whether in the particular case there was such provocation: *Crim. Code, sec. 261*. It is said that there is no evidence here of passion; but where provocation is proved is it to be said that a jury is bound to convict of murder as a matter of law in the absence of express evidence of passion outside of the act of homicide itself? That is an impossible proposition. If the circumstances are such as legitimately to raise in the minds of the jury a real doubt as to the presence of malice in the legal sense then it is the duty of the jury not to convict of murder. Is it to be laid down as a proposition of law that the presenting of a pistol, in such circumstances as those we are considering, cannot properly afford a foundation for such a doubt? The case is perhaps stronger in support of the suggestion that the appellant acted in reasonable fear of bodily harm. The account given by the Jasbec woman of Eberts' conversation with her, as I have

already indicated, pointedly suggests such fear as his ground of action. A Court of Appeal would, however, be assuming a very grave responsibility if finding in the record evidence of circumstances which ought to have been considered by the jury as bearing upon the question whether the accused had acted in self-defence in response to a sudden assault, it should say as a matter of law that these circumstances could afford no basis for a defence on the ground of provocation. To draw the line between the effect of acts and words such as those attributed to the unfortunate victim in producing such a state of passion as would constitute provocation within the meaning of the law and their effect in producing a reasonable fear of bodily harm such as would afford a ground for justification would be a feat of some difficulty, and one which a Court of Appeal could rarely attempt with safety.

I suppose indeed that no competent lawyer would be found to argue that these circumstances ought not to have been considered by the jury had it not been for the fact that Eberts himself went into the witness-box and denied all knowledge of the facts alleged against him. That he did so is undoubtedly a circumstance which would tell powerfully, and properly so of course, with any tribunal against the defence now suggested. But I am quite unable to bring my mind to the conclusion that the weight to be attributed to that suggestion was not altogether a matter for the consideration of the jury.

Two points remain. As to the suggestion that Eberts' statements point to action in self-defence and not to action as a result of provocation and that since the learned Judge was asked to reserve a case only on the latter point it is not open to us to afford any relief, even assuming the prisoner to have been deprived of the benefit of a defence fairly open on the evidence—it will be unnecessary to repeat what I have said as to the bearing of the circumstances in question upon the defence of manslaughter. But there is a further observation to be made. The learned Judge ruled in the most unmistakeable

way that if the jury found the prisoner was the author of the homicide then it was their duty to convict of murder. The necessary effect of his ruling was to withdraw from the jury all the considerations arising upon the prisoner's statements to Jasbec and his wife. He did not tell the jury that on the whole case they must convict of murder or acquit. He told them in effect that if they found the prisoner had killed the deceased it was their duty to convict of murder. The statement of a case then with regard to manslaughter in effect would raise the substantial question I have been discussing, namely, whether assuming the prisoner to be the author of the homicide there was any ground upon which a jury might reasonably entertain a doubt as to whether he was guilty of murder.

The remaining question is whether it appears in the language of sec. 1019 that there was any "substantial wrong or miscarriage of justice." It is contended by Mr. Johnston that the prisoner having deliberately elected to stand upon an alibi cannot avail himself of a defence which is open upon the evidence adduced by the Crown but which assumes his complicity in the homicide. In civil cases it is a rule generally acted upon that in order to prevent litigation going on forever a party who deliberately elects at the trial to fight his case out upon one issue and gets beaten upon it cannot raise on appeal a new and totally different issue. I should desire to consider the question long and carefully before committing myself to such a proposition as applied to prosecutions for criminal and especially for capital offences.

It is not easy to reconcile this contention with the rule laid down in *Reg. v. Gibson*, 18 Q.B.D. 537:—

We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not:

per Mathew, J., at p. 543. In any case it had no application here. It was stated in the argument by counsel for the prisoner and not disputed that the issue of manslaughter was fully placed before the jury by counsel, and indeed the suggestion

that it was not would be incredible. Then it is said that the evidence as a whole as it appears upon the record is convincing of the prisoner's guilt, and that since we can see that he was rightly convicted, we are bound to hold that there had been no "substantial wrong or miscarriage." I cannot agree. The construction of these words was authoritatively settled eighteen years ago by the Privy Council in *Makin v. A.-G. for N.S.W.*, [1894] A.C. 57. Apart altogether from the binding force of the decision as an authority, the reasoning of Lord Herschell at pp. 69 and 70 is complete and conclusive. This is the passage:—

The point of law involved is, whether where the Judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.

It was admitted that it would not be competent for the Court to take this course at common law, but it was contended that sec. 423 of the Criminal Law (Amendment) Act, 1883 (46 Vict. No. 17) empowered, if even it did not compel the Court to do so. That section is in these terms:—

"The Judge by whom any such question is reserved shall, as soon as practicable, state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the Judges of the Supreme Court who shall determine the questions and may affirm, amend or reverse the judgment given or avoid or arrest the same, or may order an entry to be made on the record that the person convicted ought not to have been convicted, or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was, of course, placed upon the language of the proviso. It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence—that is to say, what the law regards as

evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The Judges are, in truth, substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appeal to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might, under such circumstances, be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend in their Lordships' opinion to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict, matters which ought not to have been submitted to them.

In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

His Lordship is here dealing of course only with the case in which inadmissible evidence has been admitted and has gone before the jury. His observations, however, seem to apply with equal force to the case of a misdirection in consequence of which a relevant evidence has been withdrawn from the consideration of the jury which might under a proper instruction and not unreasonably bring their minds into a state of doubt as to the

propriety of the verdict at which they ultimately arrived. Such a misdirection is error that (since it deprives the accused of his constitutional right to have submitted to the decision of a jury all the defences open to him on any reasonable view of the evidence) can only be corrected by setting aside the verdict.

ANGLIN and BRODEUR, JJ., concurred in the opinion stated by Mr. Justice Davies.

Appeal dismissed; DUFF, J., dissenting.

[SUPREME COURT OF ALBERTA.]

BEFORE WALSH, J.

REX v. DAVIS.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—2)—VERIFICATION BY OATH—AMENDMENT OF INFORMATION—FAILURE TO RE-SWEAR—SUBSTITUTION OF NAME OF ACCUSED.

A conviction for an offence against the Liquor License Ordinance cannot be sustained under an information and warrant describing the accused as "Big Boy of Calgary, Alberta," where, before the accused pleaded to it, the information was amended, without being re-sworn to, by striking out the words "Big Boy" and substituting therefor the name of the accused, William Davis, and where his objection to the jurisdiction of the police magistrate to try him on the ground that no sworn information had been laid against him, was overruled and the trial proceeded with.

[*Regina v. McNutt*, 3 Can. Cr. Cas. 184, and *Re Conklin*, 31 U.C.Q.B. 160, 165, specially referred to; *Re v. Crawford*, 6 D.L.R. 380, distinguished.]

2. HABEAS CORPUS (§ I C—12)—JURISDICTION OF POLICE MAGISTRATE—ILLEGAL PROCEEDINGS—ABSENCE OF A SWORN INFORMATION.

An accused person in an application on the return of a summons for a *habeas corpus*, may avail himself of an objection to the jurisdiction of a police magistrate to try him for an offence against the Liquor License Ordinance, on the ground that no sworn information had been lodged against him and that he was therefore improperly brought before the magistrate, under a warrant of arrest, where his objection before the magistrate was overruled, the trial proceeded with, and the accused found guilty.

[*Re Baptiste Paul* (No. 2), 7 D.L.R. 25, followed; *Regina v. McNutt*, 3 Can. Crim. Cas. 184, 186, referred to.]

DECIDED: October 26, 1912.

APPLICATION, on the return of a summons for a writ of *habeas corpus* with *certiorari* in aid, to quash the conviction of the prisoner for a breach of the Liquor License Ordinance, and for his discharge from custody without the actual issue of the writ.

The prisoner was discharged from custody.

J. McK. Cameron, for the prisoner.

Stanley L. Jones, for the Crown.

WALSH, J.:—Davis is a prisoner in close custody in the lock-up of the city of Calgary under a warrant of commitment issued by the police magistrate following his conviction for a breach of the Liquor License Ordinance. On the return of a summons for a writ of *habeas corpus* and a *certiorari* in aid he applies for an order quashing this conviction without the actual issue of the writ of *certiorari* and for his discharge from custody without the actual issue of the writ of *habeas corpus*. This application rests upon several grounds, but I have only considered one of them as it is, I think, sufficient to entitle him to his liberty.

Delmar Hodgkins laid an information before a justice of the peace against "Big Boy of Calgary, Alberta" charging him with an offence against the Liquor License Ordinance upon which this justice issued his warrant to apprehend "Big Boy." This warrant was executed by the informant Hodgkins by the arrest under it of the prisoner. Before the accused pleaded to this charge the information was amended by Hodgkins who struck out from it the words "Big Boy" and substituted therefor the words "William Davis" and the information thus amended was not re-sworn. Counsel for the accused called the attention of the magistrate to this and objected to the police magistrate's jurisdiction to try this charge on the ground *inter alia*, that as the information had been altered and not re-sworn there was no valid information upon which the police magistrate could act and he moved for the discharge of the accused. These objections were overruled by the police magistrate who proceeded to a trial of the accused and finding him guilty, imposed upon him a fine of \$100 and costs or two months' imprisonment. It is

under a warrant issued upon this conviction that the applicant is now in custody.

The warrant under which the accused was arrested could only have been issued under an information in writing and under oath. See section 654 of the Code, which, by section 711, is made applicable to summary convictions. The only sworn information is that charging Big Boy with the offence named in it. There is no sworn information of any kind against William Davis. And yet it is William Davis who is convicted of the offence which is sworn in the information to have been committed by Big Boy. In short, there is a sworn information against and a warrant to apprehend Big Boy under which a conviction is made against William Davis. And being before the magistrate under a warrant which could only have been issued on a sworn information charging him with having committed the offence therein specified, I think that in the absence of such information, he was there improperly. It may be that "Big Boy" is but an alias for "William Davis," but of this there is no evidence before me. Even if such is the case, I do not see how that would mend matters. There is authority for the proposition that an information which has been amended must be re-sworn in order to retain its validity, at any rate where a sworn information in writing is a prerequisite to the jurisdiction of the magistrate. See *Regina v. McNutt*, 3 Can. Cr. Cases 184, and remarks of Wilson, J., in *Re Conklin*, 31 U.C.Q.B. 160 at 166. *A fortiori* it seems to me that when in such a case there is no sworn information at all against the accused, a conviction against him is bad. The case of *Rex v. Crawford*, 6 D.L.R. 380, decided by our Court *en banc* is easily distinguishable from this case. That was a case of a summary trial and the judgment of the Court was rested partly upon that fact and partly upon the ground that in that case an information was not necessary at all.

The accused was, therefore, in my opinion, improperly before the magistrate. There remains then for consideration only the question which my brother Simmons decided in one way: *Re Baptiste Paul* (No. 1), 7 D.L.R. 24, and which my

brother Beck in the same matter decided in the other way, *as Baptiste Paul* (No. 2), 7 D.L.R. 25, namely, whether or not the accused being, although improperly brought there, before a magistrate otherwise having jurisdiction over him in respect of this offence can insist upon the objection that he then unavailingly made against the right of such magistrate to try him. There are many authorities in support of the two conflicting views of this question none of which is I think binding on me so that I am free, as were my learned brothers, to follow the line of decisions that most appeals to me. I adopt the view of my brother Beck as it is to my mind more in consonance with reason and justice. If during a sittings of this Court a man came into the Court room bringing with him another by force and stated to the Judge that this other owed him an amount which was within the jurisdiction of the Court and asked him to award judgment in his favour for the same and the alleged debtor protested that the Court could not in that summary manner and without the issue of the proper process determine the question of liability, it could not be supposed for a moment that judgment could be then and there given against him. There is a certain procedure established by our civil practice which must be followed before the Court can by its judgment give effect to the rights of litigants. Why should any rule less strict be applied to the practice of Courts in matters involving the liberty of the subject when this practice is as clear cut and well defined as that of our civil Courts? All that a man can do who was in the prisoner's plight is to protest and if that protest is based upon proper grounds effect should be given to it by this Court if the magistrate disregards it. As Chief Justice Graham says in *Regina v. McNutt*, 3 Can. Cr. Cas. 184, at 186:—

Having stated an objection and having caused that objection to be noted, I cannot see what further a man under arrest can do. He cannot leave the Court room; he cannot apply to have *certiorari* before judgment and he ought not to be obliged to take the chances of his point and sit mute, allowing other defences to go by abstaining from cross-examining witness.

The order will go for the discharge of the prisoner.

Prisoner discharged.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE KELLY, J., IN CHAMBERS.

REX v. STEPHENSON.**1. INTOXICATING LIQUORS (§ III A—55)—CONVICTION—UNLAWFUL SALE—
MAGISTRATE REFUSING TO ALLOW ANALYSIS OF LIQUOR, EFFECT OF.**

Upon a conviction for selling liquor without a license when the defence has been that only non-intoxicating liquor has been sold, it is a good ground for quashing the conviction that the magistrate refused to allow the liquor found on the premises to be analysed.

DECIDED: November 12, 1912.

MOTION to quash a conviction for selling liquor without a license.

G. W. Bruce, K.C., for the defendant.

H. S. White, for the magistrate.

KELLY, J.:—Defendant was convicted by the Police Magistrate for the Town of Collingwood of selling liquor without a license on July 12th, 1912, and a penalty was imposed of a fine of \$250 and \$22.15 costs, and on default three months in gaol at hard labour. The information was laid on July 15th and the hearing before the magistrate was begun on July 20th and evidence was then taken. Judgment was given on July 27th.

At the time of the occurrence in respect of which the charge was laid, the police officer seized (in defendant's premises) what he said was a bottle of beer, but which defendant swore was non-intoxicating beer, the same, he swore, as he was selling on that day in his premises. The bottle seized bore, at the time, a label "Salvador," the name of a beer which is said to be intoxicating. The officer who seized it swore he had "no other reason of thinking it was "Salvador" beer except from the label."

One of the grounds relied upon by defendant for quashing the conviction is that he was not given an opportunity of putting in evidence which he tendered and which the magistrate refused to consider.

On the motion an affidavit of the magistrate was filed wherein it is shewn that immediately after the service of the summons on

July 15th, defendant's counsel applied to him (the magistrate) to have the beer which was seized sealed up, and he sealed it up in presence of the counsel; and further that when the case came on for hearing on July 20th, he was asked by the same counsel to send the beer for analysis, it being still in the possession of the police officer, and that he then told defendant's counsel that the case must go on on that day and afterwards the beer could be sent for analysis, and that he would in the meantime withhold judgment. The magistrate says further that after defendant had given his evidence on the 20th his counsel again requested that the beer seized be analysed, in reply to which the magistrate said he did not wish it analysed, but if defendant's counsel wished it, he (the magistrate) would direct the chief of police to send it to the Provincial Analyst; and that after the Court had adjourned he gave directions to that effect.

It is also set out in the affidavit of the magistrate that at the hearing, counsel for the prosecution having argued that defendant having admitted that the label on the bottle seized and the label on other bottles sold was "Salvador," and held out by him to his customers as intoxicating liquor, he was estopped from shewing that the bottles contained non-intoxicating beer; and that he (the magistrate) said he would convict at once if counsel for the prosecution could satisfy him by authority that defendant was estopped.

I am taking the magistrate's version of what took place, though the defendant's counsel puts the case even stronger. The magistrate, however, says, in his affidavit—not in the record of the conviction—that the question of analysis or the doctrine of estoppel had no bearing upon his judgment, as he made the conviction on other grounds.

The analysis was not produced afterwards, and on July 27th, without further reference to it, or further opportunity to defendant to complete that part of his defence, the conviction was made.

Under the circumstances the accused had not a fair trial. In a proceeding involving, as in this instance, a heavy fine and

the liberty of the accused, he should have been afforded the fullest opportunity of putting forth his defence, and when he sought to have an analysis made of the liquor which was in possession of the police officers, and which on the prosecutor's own shewing was taken from defendant's premises as part of what was there being consumed at the time of the seizure, and defendant contending that what was seized and what was being consumed on his premises was non-intoxicating beer, it cannot be said that he was afforded the opportunity of making a full defence, when the analysis was not proceeded with, especially as the magistrate himself admits that when on July 20th he was asked to have the analysis made, he said the case must go on on that day, that afterwards the beer could be sent for analysis and that he would in the meantime withhold judgment.

The conviction is, therefore, quashed, with costs, and there will be an order of protection to the magistrate.

I have not dealt with the other objection raised by defendant's counsel on the motion.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE MEAGHER, J.

Re PELTON.

1. JUSTICE OF THE PEACE (§ I—2)—STIPENDIARY MAGISTRATES—STATUS—RELATIONS TO MUNICIPALITY.

The stipendiary magistrate of an incorporated town in Nova Scotia is an independent judicial officer appointed by the Lieutenant-Governor-in-Council and in no wise subject to the control or direction of the town council, the only relation of which body towards the magistrate is that it is required to fix his salary.

2. MUNICIPAL CORPORATIONS (§ II A—34a)—TOWN OFFICERS—SALARY OF STIPENDIARY MAGISTRATE.

The provisions of the Towns Incorporation Act (R.S.N.S. 1900, ch. 71, secs. 121 to 124) empowering a Judge of the Supreme Court to reinstate, when improperly removed, a town officer whose appointment is during good behaviour, or to rescind a resolution reducing his salary where such resolution is not passed in the exercise of the *bond fide* discretion of the town council, do not apply to stipendiary magistrates appointed by the Lieutenant-Governor-in-Council, although the magistrate's salary is fixed by the town council.

3. COURTS (§ I C 3—102)—JURISDICTION — CONTROL OVER MUNICIPAL ORDINANCES.

The Court cannot, under the provisions of R.S.N.S. 1900, ch. 71, secs. 121-124, interfere where a resolution was passed by the town council reducing the salary of its stipendiary magistrate not in the exercise of the *bond fide* discretion of the council, but for the purpose of forcing him to resign, with the intention of securing the appointment of a successor in the hope that the latter's decisions in connection with liquor license prosecutions would be more in accordance with the wishes of certain members of the council.

DECIDED: November 12, 1912.

APPLICATION of Charles S. Pelton to rescind a resolution of the council of the town of Yarmouth, reducing his salary as stipendiary magistrate for that town and as clerk of the Police Court.

The application was dismissed.

H. Mellish, K.C., and *J. B. Kenny*, for the applicant.

W. E. Roscoe, K.C., for the town council.

MEAGHER, J.:—The applicant was appointed stipendiary by the Governor-in-council in May, 1907; the salary for that position and that of clerk of the Police Court had been previously fixed at \$850 by the town council.

In June, 1910, a by-law was enacted by the council and approved by the Governor-in-council placing his salary as stipendiary at \$850, and as clerk at \$150 per annum. On the 11th of January, 1912, a resolution was passed in terms, repealing the above by-law so far as the stipendiary's salary was concerned. It was sent to the executive for approval; it was refused on the ground it was not necessary. On the 18th of April last, a resolution was passed by the council reducing the stipendiary's salary to \$500 and the clerk's to \$100 from March 31st, 1912. On the 23rd of October, 1911, the Governor-in-council appointed one Charles McKay, an additional stipendiary for that town, and on the 29th of February, 1912, the council, by resolution, fixed his salary at \$400 per annum.

The application is founded on sec. 121, etc., of the Towns Incorporation Act, R.S.N.S. 1900, ch. 71. The contention made

was that the resolution was not passed in the *bonâ fide* exercise of discretion by the council, nor in the public interest; but to compel or induce the stipendiary to resign, and that it required the approval of the Governor-in-council to render it effective.

Counsel for the town controverted the above and further urged that the stipendiary was not an officer of the town in any sense and therefore the invoked statute did not apply.

I was referred to sec. 111 of chapter 71 to shew that the stipendiary was regarded by it as a town officer—to sec. 121, which speaks of “any officer,” and to sec. 263, sub-sec. 4, to shew that the statute made no distinction between officers appointed by the Crown and those by the town.

Section 111 provides that the town clerk shall hold office during good behaviour, and section 118 contains a like provision in respect to the town solicitor. These appear to be the only officers of the town under the statute whose tenure is expressly provided to be during good behaviour.

Section 121 enacts—omitting portions not at present material—that any officer of the town, the tenure of whose office is during good behaviour, whose salary, as such officer, to be then fixed by by-law or resolution, is reduced by resolution of the council may apply to a Judge to have such resolution rescinded; section 1221 prescribes the procedure therefor, and section 123 refers to a case of removal.

Section 124 (sub-section 1) provides that in the case of reduction of the salary of any such officer, if the Judge determines that the resolution was made in the *bonâ fide* exercise of the discretion of the town council and made in the public interest, and with due regard to the efficient performance of the duties of such office, he shall dismiss the application and sub-section 3 empowers the Judge to rescind the resolution if he finds it was not made in the *bonâ fide* exercise of discretion, or that it was to compel or induce such officer to resign.

There is no reference in this provision to the public interest or the efficient performance of the duties of such office,

which appear in sec. 124. This is a new and special jurisdiction and therefore one must be reasonably sure that what he does is within the powers conferred, or arises by necessary implication from the purview of the statute. Ordinarily the Courts do not interfere in merely administrative matters with the action of municipal bodies.

I do not attach any importance to the question touching the need for a new by-law displacing or modifying the old one on the subject, or its approval by the Governor-in-council, because section 121 appears to recognize a right in the council to act in the matter of reduction whether the salary of the town officer was fixed by resolution or by-law. I am unable to find anything in the statute which expressly or by necessary implication makes the stipendiary an officer of the town. The fact that amongst the many officials the town may appoint or who hold positions affecting town interests, two only are named as holding office during good behaviour, is opposed to the view that there can be an implication in favour of the position contended for.

The words "any officer" in section 121 is governed by what follows defining the status of the officer to be affected, or benefited, by the provisions. It was also contended that section 115 supported the view that the stipendiary was recognized as an officer of the town, but I can find no words in it in the least helpful in the direction claimed. The officer to whom section 121 refers is one appointed by the town, and who is therefore its officer, and whose tenure is during good behaviour; that seems to be its intention and meaning.

The applicant was not appointed by the town nor has the town the slightest power over him as stipendiary; he is an independent judicial officer, a public officer in no wise subject to the control or direction of the council; it would be lamentable if he were so subject. Chapter 33 provides that stipendiary magistrates shall be appointed by the Governor-in-council, shall hold office during good behaviour, and shall be paid by the town

council such annual salary as may be agreed upon but not in any case less than \$150:

The only relation, therefore, filled by the council towards the applicant under the law is that it is obliged by statute to fix his annual salary at \$150 or upwards; and that I am unable to regard as constituting him an officer of the town, and consequently I am not in a position to exercise the jurisdiction invoked. Several affidavits were produced on both sides upon the subject of the alleged conduct of the applicant, and the causes which induced the adoption of the resolution attacked.

The duties and responsibilities of a stipendiary have been materially increased in recent years, and meantime there has been a very substantial increase in the cost of all the necessities of life, and in view of these, and the fact that the town has been receiving very considerable sums from the fees of the office of stipendiary, it would be but reasonable to expect his salary would have been left untouched. Certainly one would not look for a reduction either in the public interest or as a matter of economy. Moreover, the reduction of the salary did not effect any saving of revenue, and I am quite persuaded the council neither expected nor intended it should. The sum payable to the additional stipendiary equals the reduction made in the applicant's stipend. It is therefore obvious the reduction was not made in the interest of economy. Under the conditions produced by the action of the council the stipendiary has been doing about two-thirds of the work, and the additional stipendiary about one-third, and that not the most onerous. This cannot well be regarded as a fair distribution either as regards work or compensation.

In my opinion there is little or no room for doubting that the proceeding attacked was prompted by a desire to get rid of this applicant because of alleged dissatisfaction with his decisions in proceedings for breaches of the Canada Temperance Act. It was a colourable proceeding with that end in view. Councillor Kinney, a member of the temperance committee, ap-

peared to be the mouthpiece of the council, and, in the debate on the resolution, his expressed desire was "to have a stipendiary to try cases under the Canada Temperance Act who was in sympathy with the cause of temperance." The person who would advocate the appointment of another stipendiary for the reason he gave must possess a strangely constituted mind on the duties of judicial officers and the due administration of justice. The only qualification he seemed to think necessary—or at any rate the most material one—was sympathy with the temperance cause: a quality which would be liable to aid that cause regardless of what justice demanded. I say this because no other ground of complaint against the stipendiary was put forward at all prominently. Mr. Kinney seemed to forget that the stipendiary's oath of office obliged him "to do right to all manner of people after the laws of the province without fear, favour, affection, or ill-will." Under that oath sympathy with the temperance cause would be as much out of place in a stipendiary's mind as sympathy with those accused of breaches of the Canada Temperance Act or any other statute or rule of law; yet Mr. Kinney was ready to punish for the supposed existence of the latter while eager to secure the possession of the former in the new incumbent. The language he used is all the more objectionable because the council of which he was a member filled a position not far removed from that of prosecutor in the liquor cases. Temperance is, of course, a necessary virtue in all circumstances and in all things; but justice is equally necessary in human affairs; the latter, however, in the minds of extremists, when they deem the interests of temperance involved, is of little moment. In the estimation of a good many so-called temperance people, whose minds are either not well balanced or whose moral construction has been defective, temperance appears to be the only virtue worth upholding.

It will be an evil day for Nova Scotia, as far as the administration of justice is concerned, when the tenure, even of stipendiaries, not to speak of other judicial officers, or their char-

acters, depends upon the opinions of extremists, and those who co-operate with them, as to the correctness of their decisions or the propriety of their behaviour. My experience in legal matters of nearly half a century confirms me in the belief that it is those who know the least about the facts or the law of a given case, who talk most vehemently and comment most unsparingly upon the decision in it, and are always the most ready to impute dishonesty, or ignorance, to the judicial officer or tribunal which gave it. Vulgar, noisy criticism (and but rarely it has any better quality) in nearly every instance, proceeds from ignorance, audacity, or empty-headedness, and a vain desire to be deemed of importance in the community.

It is matter for greater regret that even members of the Bar who fail in their advocacy of a certain cause, or series of causes, are sometimes found adopting much the same line of conduct, and lending their aid to bring the administration of justice into disrepute in order, perhaps, to account for the failure of the cause they supported, or to retain the good opinion of those who employed them and those who co-operated with such employers. Such a course is an easy and convenient one, but it is very rarely a true or just one, and still more rarely an honest or manly one in this province.

The application must fail as a matter of law, but I shall not say anything on the subject of costs at this stage, because the statute is silent on that branch. Neither shall I refer further to the charges made against the applicant.

Application dismissed, costs reserved.

[SUPREME COURT OF ALBERTA.]

BEFORE STUART, J.

Re WILLIAM STAGGS.

(Decision No. 1.)

1. HABEAS CORPUS (§ 1 C—18)—EXTRADITION PROCEEDINGS—CONFLICT OF DATES AS TO TIME OF OFFENCE.

Upon an application on habeas corpus for the discharge of a prisoner from custody, where it appears that in extradition proceedings he was committed upon the charge that he did "on or about the 8th day of February, 1912," obtain a promissory note from a certain party by false pretences with intention to cheat and defraud, and where the proceedings were begun by an information which stated that the offence had been committed on "the 8th day of February, 1911," and where throughout all the documents forwarded from the foreign jurisdiction up to the date of the present application the offence is alleged as of "the 8th day of February, 1911"; the warrant of commitment is invalid.

[Extradition Act, R.S.C. 1906, ch. 155. See also *United States v. Webber* (No. 1), 5 D.L.R. 863; *Re Webber et al.*, 6 D.L.R. 805.]

2. INDICTMENT, INFORMATION, AND COMPLAINT (§ 2 A—7)—SUFFICIENCY OF ALLEGATIONS—TIME—CONFLICT OF DATES.

Where the accused is committed under a warrant of commitment for extradition based on an information alleging the offence as of a year prior to the date shewn by the commitment, the information is not a sufficient basis for the commitment, and the prisoner will be discharged in a *habeas corpus* proceeding.

3. EXTRADITION (§ 1—8)—INTERNATIONAL — REVIEW OF PROCEEDINGS — OMISSION TO READ STATUTORY STATEMENT.

In an extradition proceeding under the Extradition Act, the omission of the extradition judge to read to the accused the statement set forth in sub-sec. 2 of sec. 684 Cr. Code 1906, is not fatal to the proceedings.

[Can. Crim Code, R.S.C. 1906, ch. 146, sec. 684, referred to; see also *United States v. Webber* (No. 1), 5 D.L.R. 863; *Re Webber*, 6 D.L.R. 805, concerning criminal procedure requirements.]

4. EXTRADITION (§ 1—8)—INTERNATIONAL — REVIEW OF PROCEEDINGS—FOREIGN DEPOSITIONS—ORIGINAL—COPY.

A foreign deposition for use in an extradition proceeding must purport to be certified as the original or a true copy thereof by a judge, magistrate, or officer of the foreign state; and it is not admissible in the extradition proceeding when it appears that the certificate is not given by any such foreign officer competent to certify that the original deposition contains a true record of the evidence given by the deponent.

[Extradition Act, R.S.C. 1906, ch. 155, sec. 17, referred to.]

DECIDED: November 23, 1912.

AN application for a writ of *habeas corpus* and for the discharge of the prisoner from custody without the actual issuing of the writ.

The prisoner was discharged.

Cameron, for the accused.

James Short, and *F. S. Selwood*, for the State of Kansas.

STUART, J.:—On the 9th of November, 1912, Mr. Justice Simmons, acting as a Judge under the Extradition Act, issued his warrant committing one William Staggs for extradition upon the application of the State of Kansas upon a charge that the said Staggs, did on or about the 8th day of February, 1912, obtain a certain promissory note from the Welda State Bank in the State of Kansas by false pretences with intention to cheat and defraud the Welda State Bank.

The extradition proceedings were begun by an information under the Extradition Act which stated that the offence had been committed on the 8th day of February, 1911. Strangely enough, throughout all the documents which had been forwarded by the authorities in Kansas to date, 8th of February, 1911, had been inserted. It was not until the oral evidence was taken before Mr. Justice Simmons that it clearly appeared that the cheque which the accused was alleged to have given and which turned out to be worthless and in return for which he had received the note in question was dated and had been in fact given on the 8th of February, 1912, although in the information itself it does appear by the copy of the cheque inserted therein that the date was the 8th of February, 1912.

The accused is now being held for extradition under the warrant of the 9th of November. This is an application for *habeas corpus* and for the discharge of the accused without the actual issue of the writ. I have consulted both my brother Simmons and my brother Walsh, the latter of whom issued the summons for the *habeas corpus* proceedings and they both agree with me that the warrant of commitment which states that the offence was committed on the 8th day of February, 1912, cannot stand upon an information which states that the offence was committed on the 8th of February, 1911. It was suggested and strongly urged upon the argument, and it is, no doubt, the fact, that the date, 8th of February, 1911, was throughout a typographical error.

If I had any power to amend, it would probably be a proper case for making an amendment, but I cannot see that I have any authority whatever to make such an amendment in the information. Possibly that amendment might have been made by Mr. Justice Simmons at the hearing, at any rate if the information was re-sworn. However that may be, it is clear that I cannot make it now. That being so, it is impossible for the warrant of commitment to stand; this is quite sufficient to justify an order for the discharge of the accused and he will be discharged accordingly.

A number of other objections were taken to the proceedings, but I shall only refer to two of them. One objection was that the extradition Judge did not, at the close of the hearing of the evidence read to the accused the statements set forth in subsection 2 of section 684 of the Criminal Code, and it was argued that by virtue of section 13 of the Extradition Act which directs that a hearing of an application for extradition shall proceed as nearly as may be in the same manner as if the fugitive was brought before a justice of the peace charged with an indictable offence committed in Canada, this statement must necessarily be read to the accused or otherwise the proceedings are defective. As I stated on the argument I am of opinion that this is not fatal to the proceedings. The very wording of the statement shews that the justice of the peace is giving the accused some assurances as to what may or may not happen during the later course of the proceedings against him and during his trial in the Canadian Courts. I cannot see that an extradition commissioner has any right or could be expected to give any assurances as to what would happen on the trial of the accused in Kansas.

Another objection referred to the deposition of one L. A. Davis, which was put in before Mr. Justice Simmons. Davis was the manager of the bank in Oklahoma, upon which bank the cheque, which was alleged to have been worthless, was given, and his evidence was adduced in order to shew that the accused had not any funds to his credit in that bank. It is very clear to me

that this deposition was not admissible. It was taken before one W. J. Orme, a notary public, and was taken in the State of Oklahoma. The original deposition was not produced. All that was produced was a copy of it certified to be a true copy by one E. C. Simons, a justice of the peace for a certain county in the State of Kansas, and his certificate states that the copy produced was a true copy of the depositions of Davis on file in his office. I do not think that this is in compliance with section 17 of the Extradition Act. That section says that the deposition must purport to be certified to be the original or true copies by a Judge, magistrate or officer of the foreign state. Now, it is true, that Mr. Simons does certify that the document to which his certificate was attached was a true copy of a deposition which was in his office, but the real effect of his certificate is this: that he certifies that the copy which he sends forward is a true copy of something which purported to be the original of a deposition taken before Orme, the notary public. This, it seems to me, does not give any sufficient authentication of the actual evidence given by Davis. The extradition Judge, it is true, by virtue of section 17 may accept depositions which purport to be certified to be true copies, but my opinion is, that this certificate must be given by some one who is in a position to certify that not only the copies, but the originals of which they are copies do, in fact, contain a true record of the evidence given by the witness. Simons, the justice of the peace, was not in a position to do that. Quite evidently all he had before him was what purported to be a deposition made by Davis before Orme in another state. That was consequently insufficient, and, I think, the deposition of Davis was, therefore, inadmissible.

However, I think Mr. Justice Simmons was possibly justified in accepting the evidence of Van Duzer, given before him orally to the effect that he was manager of the Welda State Bank and that the cheque that had been given to him on the Oklahoma bank had been returned with a notarial protest attached in which the statement was made that there were no funds, as sufficient

prima facie evidence that there were in fact no funds for the cheque at the time that it was given.

Mr. Justice Simmons tells me that this is the view he took, and my brother Walsh, on a casual statement of the facts seems inclined to agree with that. If there had been nothing further I do not think that I could have set aside the commitment on the ground that there was not sufficient evidence of the false pretence to justify a committal by a magistrate.

It is not necessary to refer to any of the other grounds taken as the prisoner will be discharged in any case.

Prisoner discharged.

[SUPREME COURT OF ALBERTA.]

BEFORE WALSH, J.

Re WILLIAM STAGGS.

(Decision No. 2.)

1. EXTRADITION (§ I—3)—PERSONS SUBJECT TO EXTRADITION—CRIME UNDER LAWS OF BOTH COUNTRIES.

Extradition will be ordered under the extradition treaties and conventions with the United States of America, only upon its being established that the extradition offence is a crime against the law of the demanding country, and if it had been committed in Canada would be a criminal offence there.

[*Re Latimer*, 10 Can. Cr. Cas. 244, followed.]

2. FALSE PRETENCES (§ I—6)—FAITH IN THE FALSE REPRESENTATION—ELEMENTS OF FALSE PRETENCES.

To make out a charge of obtaining money by false pretences it is not sufficient to prove that the false representation was made, and that the person making it got money from the person to whom he made it, but it also must be shewn that it was upon the strength of the representation thus made that the person wronged was induced to part with his money.

3. EVIDENCE (§ XI A—761)—RELEVANCY AS TO CONCURRENT DATES—OWNERSHIP OF GOODS AT FIXED DATE—FALSE PRETENCES CHARGE.

On a charge of obtaining money under false pretence of ownership of certain chattels, the testimony of a witness taken nearly a year after the alleged offence, stating merely that such witness "was" the owner, is insufficient to negative the alleged pretence, unless such deposition by its context or otherwise indicates the date of the offence as the time at which he was the owner.

DECIDED: November 30, 1912.

HEARING of an extradition case against the defendant on a charge of having obtained certain money by false pretence.

The accused was discharged.

A prior extradition matter upon a different charge is reported *sub nom. Re William Staggs* (No. 1), 1 D.L.R. 738.

Frederick S. Selwood, for the State of Kansas.

J. McKinley Cameron, for the accused.

WALSH, J. (oral):—Section 18 of the Extradition Act imposes upon me the duty of issuing my warrant for the commitment of the fugitive if such evidence is produced as would, according to the law of Canada, justify his committal for the crime if committed in Canada and sub-sec. 2 makes it my duty if such evidence is not produced to order the fugitive to be discharged.

The evidence which is offered here in support of the committal for the extradition of this man is that of Fred P. Spraul, T. C. Van Dusen and W. O. Knight. I have carefully read these depositions and, in my opinion, they do not make out such a case against this accused as would, if the alleged offence had been committed in Canada, justify his committal for trial, and I will, therefore, have to discharge him. I do so on two grounds. There are some minor difficulties in addition which the depositions present. I have not considered these with any degree of care at all as I did not think it necessary to do so in view of the opinion which I have arrived at on the main grounds. It may possibly be that on investigation these might be serious, but I am making no more than a passing reference to them now. The false pretence which is alleged against Staggs is his fraudulent representation that he was the owner of the goods in question and as such owner had the right to mortgage them. The evidence which is offered in support of this branch of the charge is that of Spraul alone. Mr. Van Dusen in his deposition winds up by saying that he verily believes that Staggs was never at any time the owner of the property and that he had not the right to mortgage it, but of course I need not waste time in pointing out that

that affords absolutely no proof of the fact that he was not the owner and had not the right to mortgage. That is a mere statement of the belief of the deponent for which no reason is given in the deposition so that proof of this part of the case rests entirely upon the evidence of Spraul. I admitted this deposition very reluctantly and against my own view as to its admissibility, but my view of the authorities which I examined with some degree of care was that it was a deposition or a statement under oath which, under the authorities, was admissible in evidence and for that reason, I let it in. It is a deposition taken in a civil action in which Spraul himself was the plaintiff and in which he was asserting his ownership and title to these very goods and the action was against the bank which was claiming these goods under the mortgage which Staggs is said to have made to it. Spraul's own interest, of course, could best be served by proving his ownership and Staggs's lack of ownership of these goods and from what Sheriff Decker very candidly said about Spraul's reputation in the community in which he lives, I think that he would not hesitate to make the best case he could for himself. The depositions by which this deposition of Spraul is proved are calculated to give the impression that what is produced as Spraul's deposition is all the evidence that he gave at the trial of that action, but it is patent on the face of Spraul's deposition that this is not so. I think it is quite clear from reading the deposition itself of Spraul that there has simply been extracted from his evidence such portions of it that serve best the purposes of this prosecution and that has been placed before me as Spraul's deposition. If that is so, I think in fairness the people who have verified this deposition by their oaths should have made it quite clear that such was the case. I doubt very much the propriety of placing before the Court certain questions and answers to them which have been culled out from the whole of the testimony of the deponent and representing that as the testimony of this man. It might be open to serious question as to whether or not such a deposition as that should be re-

ceived at all. Notwithstanding all of these objections I have carefully read Spraul's deposition and if I found in it sufficient to establish the lack of ownership of Staggs of these chattels I would have to give effect to it no matter how repugnant that might be to my sense of justice, but on reading the deposition of Spraul I am utterly unable to find that it establishes with the slightest degree of certainty that Staggs was not, on the 8th of June, 1911, the owner of these chattels. There are only three questions and the answers to them in the whole of Spraul's deposition which bear on this question of ownership. The first of them is this question and answer:—

Q. This bay mare, six years old, weighing 1,400 pounds, whose property is this? A. Mine.

That question relates to the date upon which Spraul's evidence was given which was the 18th of March, 1912, several months after Staggs is said to have alleged his ownership of the horses so that all that question and answer will establish is this: that on the 18th of March, 1912, Spraul swore that that horse was, on that day, his property. There is absolutely nothing inconsistent with Staggs's ownership of that same horse in June preceding. It may well be that Staggs owned the horse in June, 1911, and between that date and the 18th of March, 1912, his ownership ceased and Spraul became the owner of the horse. The next question is:—

Q. And whose property was the roan mare, seven years old? A. Mine.

Now, there is nothing in that question to indicate the period of time at which the ownership of the roan mare is fixed. The question is: "Whose property was the roan mare? To what period of time does that relate? It may relate to any period anterior to the 18th of March, 1912. It certainly does not fix the ownership of the roan mare as being in Spraul on the 8th June, 1911. The third question is this:—

Q. I will ask you whether or not, on the 8th of June, 1911, W. M. Staggs was the lawful owner and that he had full power to sell or mortgage the bay mare, the roan mare and the new Studebaker wagon you have been testifying about? A. No, sir, not that I know of.

Now, I do not think it can be contended for a minute that such an answer as this is even *primâ facie* proof of the fact that on the 8th June, 1911, Staggs did not own these goods and had not the right to mortgage them. It is not an absolute, straight, positive denial of Staggs's ownership and right to mortgage, but it is a qualified one and simply amounts to this, that so far as Spraul knew Staggs did not own these things then and did not have the power to sell them and what the extent of his knowledge was and information is left quite in the dark. The other questions and answers to them do not bear at all upon the question of ownership and upon the reading of the whole of Spraul's deposition or the portion of it that is before me, I have no hesitation in finding that there has not been established even *primâ facie* that the representation which Staggs made to Van Dusen on the 8th June, 1911, was a false and fraudulent representation.

The other ground in respect of which, I think, the evidence in support of this application is deficient is this. Before a man can be committed for extradition it must be established that the offence with which he is charged is one against the law, not only of the demanding country, but also of Canada. That has been settled by several decisions, one in our own Court by the late Chief Justice Sifton, *Re Latimer*, 10 Can. Cr. Cas. 244, and that is, I think, borne out by sub-sec. (b) of sec. 18. Now the charge as alleged against this man is what is commonly known as obtaining money by false pretences and it is a material ingredient in that offence according to the law of Canada that the person who has been wronged must have parted with his money in reliance upon the truth of the representations made to him by the accused. I do not think it is sufficient in this jurisdiction, at any rate to simply prove that the false representation was made and that the person making it got money from the person to whom it was made. I think the connecting link must be forged between these two ingredients by shewing it was upon the strength of the representation thus

falsely made that the person wronged was induced to part with his money. Now there is absolutely nothing in the deposition of Van Dusen to shew that that is the case here. All that he says in effect is this, that Staggs came to his office on the 6th of June, 1911, and represented that he owned and had in his possession the property that is in question, that he wanted to borrow from the bank the sum of two hundred and fifty dollars and that he wanted to give the property as described in the chattel mortgage as security for the loan on the same; that he had the sole right to execute the mortgage; that he then made, delivered and executed the said mortgage and received therefor the money of the said bank, the sum of two hundred and fifty dollars. That is the entire statement of Van Dusen with reference to the transaction itself. There is not a word to indicate that it was because of this representation of Staggs that he owned these goods and had a right to mortgage them that the sum of two hundred and fifty dollars was advanced and for that reason I think his deposition lacks the element of proving that the bank's money was parted with on the strength of the statement which was made by Staggs. The necessity for proving that is, I think, quite appreciated by those who seek Staggs's extradition for, in the information upon which the warrant was issued by Mr. Justice Stuart it is alleged that then and there, and by means of the said false pretences the said Van Dusen, the cashier and managing officer of the said banking corporation then and there, believing the same and being deceived thereby he, the said Staggs, did obtain from the bank the said sum of two hundred and fifty dollars. This is the second reason which leads me to the conclusion that there is not a *primâ facie* case made out against this man which would justify his committal for trial if the offence was committed in Canada. I might say in passing that a very material part of Mr. Van Dusen's deposition in these words, "and received therefor of the money of the said bank the sum of two hundred and fifty dollars," is interlined in his deposition with pen and ink, the rest of the deposition being typewritten.

That interlineation is not initialed either by Van Dusen or by the justice of the peace before whom it was taken and, I think, that even if the deposition was sufficient in other respects I would hardly be justified in giving effect to a deposition the most material part of which is interlined in this way.

For these reasons I order the discharge of Staggs under this warrant.

Prisoner discharged.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SUTHERLAND, J., IN CHAMBERS.

THE KING v. DEMETRIO.

(Decision No. 1.)

1. EVIDENCE (§ XII L—995a)—EFFECT AND SUFFICIENCY OF—DISORDERLY HOUSE OR PERSON.

Evidence as to a general reputation of the house is admissible upon a charge of keeping a disorderly house.

[*Regina v. McNamara*, 20 O.R. 489; *Regina v. St. Clair*, 3 Can. Cr. Cas. 551, 27 A.R. (Ont.) 308, referred to.]

2. VAGRANCY (§ I—1)—DEFINITION OF—SEC. 238 OF CR. CODE 1906.

A summary conviction for being the keeper of a disorderly house under secs. 238 and 239 of the Cr. Code 1906, is sufficient, although it does not in terms contain a finding that the accused is a "vagrant" or a "loose, idle or disorderly person" in the words of said sections of the Code which declares such offence to be vagrancy.

[*R. v. Leconte*, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, followed; *R. v. Keeping*, 4 Can. Cr. Cas. 494, not followed.]

3. SUMMARY CONVICTIONS (§ VII B—80)—FORM—LOCALITY OF OFFENCE.

A place certain should be specified so as to identify the house in question upon a conviction for keeping a disorderly house; but a summary conviction which specifies merely that such keeping was within a named municipality may be amended in that respect in certiorari proceedings to conform to the evidence by virtue of Cr. Code sec. 1124.

[*R. v. Cyr*, 12 P.R. (Ont.) 24, referred to.]

DECIDED: December 2, 1911.

AN application to quash a conviction made on the 7th October, 1911, by the Police Magistrate for the Porcupine Mining Division, in the District of Sudbury, against E. Demetrio, for

keeping a disorderly house, bawdy house, and house for the resort of prostitutes.

The grounds upon which the motion was made, as appearing in the notice of motion, were: (1) that there was no reasonable evidence to support the conviction; (2) and upon other grounds appearing upon the face of the proceedings and from the affidavits and papers filed.

F. Arnoldi, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

TORONTO, December 2, 1911.

SUTHERLAND, J.:—I am of opinion that there was ample evidence to warrant the conviction. The evidence of Piercy with reference to the character of the place in question was, I think, properly receivable in this case. See *Regina v. McNamara*, 20 O.R. 489; *Regina v. St. Clair*, 3 Can. Cr. Cas. 551, 27 A.R. (Ont.) 308.

But, apart altogether from his testimony, the evidence of James Ford and James Lawrence is definite as to facts which would warrant the conviction, and that of the woman Germain Duquette is, I think, conclusive.

It was objected that, on the face of the conviction, it is bad, as not finding the accused guilty within the terms of sec. 238 of the Criminal Code. It was urged that the accused should have been found guilty of being "a loose, idle, or disorderly person or vagrant;" and *The King v. Keeping*, 4 Can. Crim. Cas. 494, a Nova Scotia case, was cited in support of this contention. The view there adopted has not, however, been accepted in this Province, but a contrary view. See *Rex v. Leconte*, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, which is in point.

It was also contended that the conviction was bad on the ground of uncertainty, as no place is named therein where the offence charged is shewn to have been committed: *Regina v. Cyr*, 12 P.R. 24.

But the evidence is clear that the place in question was the house of the accused called and known as the "Nugget Saloon."

Under sec. 1124 of the Criminal Code, there are wide powers of amendment. I have power under this section, I think, to rectify this error, if it is one; and, as I think the evidence fully warrants me in so doing, I order and direct that the conviction be amended by inserting, after the word "Whitney" therein, the following words, "at his house there known as the Nugget Saloon."

The motion will be dismissed with costs.

Conviction affirmed.

N.B.—Leave to appeal from the above decision was refused, see *R. v. Demetrio* (No. 2), the next following case.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

THE KING v. DEMETRIO.

(Decision No. 2.)

1. SUMMARY CONVICTION (§ VII B—80) — AMENDMENT ON MOTION TO QUASH — STATUTORY POWER—CR. CODE SEC. 1124.

The intention of sec. 1124 of the Criminal Code, 1906, in giving the power to amend a summary conviction on a motion to quash is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by defects in form occasioned either by the error or by the stupidity of the magistrate.

[*R. v. Demetrio* (No. 1), 20 Can. Cr. Cas. 316, considered.]

2. APPEAL (§ I C—25) — CRIMINAL LAW — ORDER REFUSING MOTION TO QUASH SUMMARY CONVICTION.

Where a motion to quash a summary conviction has been dismissed and the conviction ordered to be amended under Code sec. 1124 as to a defect in form leave to appeal from the dismissal should be refused, if the evidence warranted all the amendments necessary to make a good conviction.

DECIDED: January 19, 1912.

MOTION by the defendant for leave to appeal from the order of Sutherland, J., in *R. v. Demetrio* (No. 1), 20 Can. Cr. Cas. 316, 3 O.W.N. 313, 20 O.W.R. 524, dismissing a motion to quash a conviction made by the police magistrate of Porcupine for keeping a disorderly house.

One of the objections taken on the motion before Sutherland, J., was that the conviction was bad as the alleged disorderly house was not designated other than by a general statement that it was kept in the township of Whitney. The evidence, however, disclosed that the place in question was the house of the accused called and known as the "Nugget Saloon," and Sutherland, J., held that he had the power to amend under sec. 1124 of the Criminal Code, 1906, and directed that the conviction be amended by adding the words following the name of the township "at his house there known as the Nugget Saloon."

F. Arnoldi, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., said that he thought the case was concluded by authority. On the evidence, the offence was proved, and enough was shewn to warrant all the amendments necessary to make a perfect conviction. The intention of Parliament in giving the power to amend is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by the defects in form occasioned by the error, or even stupidity, of the magistrate. Motion dismissed with costs.

Leave to appeal refused.

[HIGH COURT OF JUSTICE, ONTARIO]

BEFORE SUTHERLAND, J., IN CHAMBERS.

THE KING v. JOHNSON & CAREY, Limited.

1. CRIMINAL LAW (§ II A—33)—STATUTORY REQUISITE OF LEAVE—JUDGE'S CONSENT TO INSTITUTION OF PROCEEDINGS.

Where the Alien Labour Act, R.S.C. 1906, ch. 97, sec. 5, requires a judge's consent as a preliminary to criminal proceedings to recover a penalty under that Act, such consent should contain the statement of the offence committed, the name of the person against whom and the time and place where such offence has been committed; and a consent in general terms to proceedings being taken against the defendants under the Alien Labour Act for hiring persons named contrary to the terms of said Act, is insufficient unless the time and place of the offence is also mentioned.

[*Rea v. Breckenridge*, 10 Can. Cr. Cas. 180. 10 O.L.R. 459, followed.]

DECIDED: April 11, 1911.

APPLICATION by the defendants to quash the conviction made on 3rd January, 1911, by His Honour Judge Fitch, made upon the information of Knute Olson and Ed. Olson, under the Alien Labour Act, R.S.C. (1906) ch. 97, sec. 5, the defendant corporation was convicted of having unlawfully imported into Canada alien labourers contrary to the said Act, and a fine of \$500 was imposed.

Among the objections taken to the conviction was one that no written consent to the prosecution of the defendants was procured or filed as required by sec. 5 of the said Alien Labour Act.

The alleged consent was in the following words:—

“I hereby consent to proceedings being taken against Johnson & Carey Co. Ltd., for breach of the Alien Labour Act in hiring K. Olson and Ed. Olson against the terms of said Act. Dec. 20th, 1910, (signed) C. R. Fitch, District Judge.”

This alleged consent is written below a typewritten notice in the following words:—

“In the District Court of the District of Rainy River.

“In the matter of the Alien Labour Act, and in the matter of Johnson & Carey Company, Limited.

• “Take notice that an application will be made on behalf of Knute Olson and Ed. Olson, on Tuesday the twentieth day of December, A.D., 1910, at the hour of ten o'clock in the forenoon, before His Honour Judge Fitch, at his Chambers in the Court House, Fort Frances, for an order directing a prosecution of the above named Johnson & Carey Co., Limited, for breaches of the above Act.

“Dated at Fort Frances this sixteenth day of December, A.D. 1910. H. A. Tibbetts, solicitor for applicants.”

E. Coatsworth, K.C., for defendant, referred to *Rex v. Breckenridge*, 10 O.L.R. 459, 6 O.W.R. 501.

A. E. Knox, contra.

TORONTO, April 11, 1911.

SUTHERLAND, J.:—Upon the argument it was not contended that “no written consent had been procured, but that the one given was not sufficient.” [The learned Judge here set out the document relied upon by the prosecution, as above.]

It is contended on behalf of the applicant that such a consent is insufficient under the terms of the Act, upon the authority of *Rex v. Breckenridge*, 10 Can. Cr. Cas. 180, 10 O.L.R. 459, in that the time when and the place where the offence under the Act is alleged to have been committed are not set out at all in the consent, nor is the particular offence intended to be charged.

In the report of that case at page 461, Meredith, C.J., in delivering the judgment of the Divisional Court, over which he was presiding, says: “The written consent should, in my opinion, at the least contain a general statement of the offence alleged to have been committed, not necessarily in the technical form which would be required in an information or conviction, but mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged.”

The consent in the present case contains no mention of the time when, or place where any offence under the Act is alleged to have been committed, and the nature of the offence is very indefinitely set forth in the words “in hiring K. Olson and Ed. Olson against the terms of said Act.”

I think the case cited is in point, and the conviction must be quashed, upon the ground that no sufficient consent was given to proceedings being taken under the Act.

Having come to this conclusion, I do not think it necessary to deal with the other grounds raised in the notice of motion. The conviction will, therefore, be quashed with costs.

The money paid into court by way of fine and security for costs on the appeal, will be paid out to the applicant.

Conviction quashed.

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J., SCOTT, STUART, SIMMONS, AND WALSH, JJ.

REX v. WHISTNANT.

1. EVIDENCE (§ II E 8—204)—GUILT—PRESUMPTIONS AND INFERENCES — STATEMENT OR ADMISSION OF ACCUSED—INTERPRETATION BY SURROUNDING CIRCUMSTANCES.

The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

2. EVIDENCE (§ XII A—920)—CORROBORATION REQUIRED BY STATUTE—EVIDENCE OF CHILD NOT UNDER OATH—CR. CODE (1906), SEC. 1003.

As sec. 1003 of the Criminal Code (1906) specifically requires that the "testimony admitted by virtue of this section" i.e., a statement taken in court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similarly taken from another child of tender years. (*Dictum per Harvey, C.J.*)

[*R. v. Pailleur*, 15 Can. Cr. Cas. 339; *R. v. Dawn*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; *R. v. Iman Din*, 18 Can. Cr. Cas. 82, referred to.]

DECIDED: December 20, 1912.

QUESTION reserved by Stuart, J., after the trial and conviction of defendant for indecent assault as to whether there was any corroboration as required by section 1003, Criminal Code, 1906.

The question was answered in the affirmative and the conviction was affirmed.

L. F. Clarry, for the Crown.

W. S. Davidson, for the defendant.

HARVEY, C.J.:—The accused was convicted by my brother Stuart of indecent assault on one Lillian Scott. The complainant, who was 12 years old, and her sister, aged 9, gave the only direct evidence of the offence. The evidence of both was

taken without the administering of an oath, under section 1003 of the Criminal Code, but each gave direct evidence of the act.

The learned Judge has reserved the question of whether there was any corroboration as required by that section.

I am of opinion that the evidence of the sister is not such corroboration as the section requires.

In *Rex v. Pailleur* (1909), 15 Can. Cr. Cas. 339, two children gave evidence, not under oath, under section 16 of the Canada Evidence Act which authorizes the reception of evidence not under oath but provides that, "No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." It seems to have been taken for granted by the Ontario Court of Appeal in that case that there must be evidence to corroborate that of both children, which the Court found did exist. However, in *Rex v. Iman Din* (1910), 18 Can. Cr. Cas. 82, two of the Judges of the Court of Appeal of British Columbia directly held that the evidence of one child given under that section could be sufficiently corroborated by the evidence of another child so given. The other two Judges apparently held the same view, but decided that the evidence was not, in fact, corroborative.

It would appear to be a question of deciding whether the expression "such evidence" meant "evidence so given" or "evidence of such child." Section 1003, however, differs in terms from the section of the Canada Evidence Act. It provides that in the cases specified the evidence of the complainant or any other child of tender years may be given on the conditions specified, but with the following consequences:—

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section . . . is corroborated by some other material evidence in support thereof implicating the accused.

The learned trial Judge has stated that he received the evidence of both children under this section. The evidence of both was, therefore, "testimony admitted by virtue of this section" and that is what requires corroboration. It seems clear,

therefore, that no matter how many children gave evidence under that section their total evidence would be testimony under the section and, therefore, would require corroboration. There was, however, other evidence which, in my opinion, satisfies the section.

The reserved case states that a Mrs. Henson, a neighbour of the complainant, gave evidence to the effect that the complainant came to her home shortly after the time when she states the offence occurred and made a complaint of what the accused had done to her; that she and a man named Butler who was with her at once returned with the child to her home where they found the accused. Nothing was said about the matter in the house but Butler asked the accused to go outside. After they had gone out she heard a scuffle or fight as of one man pounding another and heard the accused cry out, "I won't do it again; I won't do it again." Butler was not available as a witness. In my opinion, under the circumstances of the case the inference that Butler had charged the accused with the offence and was berating him for it and that the accused's statement had reference to it is a perfectly justifiable one. It contains an implied admission of guilt and therefore constitutes evidence implicating the accused. It appears to me much stronger evidence than existed in the case of *Rex v. Daun* (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227.

Coming to the conclusion I have regarding the effect of this evidence it is not necessary to consider whether the other evidence to which the learned Judge refers was corroborative. I think the question should be answered in the affirmative and the conviction affirmed.

SCOTT, STUART, SIMMONS, and WALSH, JJ., concurred.

Conviction affirmed.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE MACDONALD, C.J.A., AND IRVING AND GALLIHER, J.J.A.

THE KING v. DAY.

1. CRIMINAL LAW (§ II B—49)—TRIAL WITHOUT JURY ON CONSENT—ELECTION OF SPEEDY TRIAL.

Where an accused person who is out on bail after commitment for trial voluntarily appears at a County Judge's Criminal Court and there elects a speedy trial without a jury, such election of the mode of trial may be accepted, although the accused was not brought in by the sheriff for election (Cr. Code sec. 826), nor was any written notice given to the judge by the sheriff under sec. 826 of the Criminal Code.

2. CRIMINAL LAW (§ II B—49)—TRIAL WITHOUT JURY ON CONSENT—ABSENCE OF SHERIFF.

An election of speedy trial under Cr. Code secs. 826 and 827 (amendment of 1909) is not invalid because of the absence of the sheriff from the County Judge's Criminal Court at which such election is accepted.

3. CRIMINAL LAW (§ II B—49)—SPEEDY TRIAL—ENTRY OF CONSENT UPON RECORD.

The entry on the court records required to be made under Cr. Code sec. 825 of the consent of the accused to be tried without a jury for an indictable offence under the speedy trial clauses (Cr. Code Part 18) at a County Judge's Criminal Court may be made by the clerk of the peace acting as clerk of such court and need not be made by the judge in person.

4. COURTS (§ I B 2—20)—JURISDICTION—CRIME IN NAVY YARD UNDER ADMIRALTY CONTROL.

The offence of receiving property stolen from a navy yard in Canada under the control of the British Admiralty is cognizable by a Canadian court of criminal jurisdiction, particularly where the accused is not subject to court-martial by the Admiralty authorities.

5. APPEAL (§ XI—721)—LEAVE TO APPEAL—CRIMINAL CASE.

Where it is quite evident to the appellate court after a consideration of the entire case that the conviction must be affirmed on the uncontradicted evidence and the law, leave to appeal, under Cr. Code 1906, sec. 1015, from a conviction on indictment or speedy trial will be refused.

DECIDED: November 8, 1911.*

MOTION for leave to appeal under the Cr. Code (1906) sec. 1015 from a conviction for receiving stolen goods.

The facts were that the accused, having been charged with the receipt of certain stores stolen from the navy yard at Esqui-

*Also reported 16 B.C.R. 323.

malt, was committed for trial by the stipendiary magistrate. He was allowed out on bail, and on the 26th of July went with his counsel before the County Judge and elected for speedy trial. On the application of the prosecution the Judge postponed until the 15th of August the question of fixing the date of trial. On the 15th, there being no Judge present, the matter was adjourned by the clerk of the peace, all parties as before being ready, but on the 18th of August, another Judge (McInnes, Co. J.) fixed the trial for September 1st. After a further adjournment the trial took place on the 18th of September. On that occasion, before arraignment, counsel for accused applied to re-elect, or to take trial before a jury, instead of speedy trial. On this application, it was submitted that, not having yet pleaded, or been arraigned, the prisoner had the right to re-elect. The Judge was of opinion that, the prisoner having come up for trial, in pursuance of his election, the witnesses being present, and everyone and everything being ready, it was too late to apply to change his election. The Judge, therefore, refused to state a case for the opinion of the Court of Appeal.

VANCOUVER, November 7 and 8, 1911.

Stuart Henderson, with *Maclean*, K.C., for the motion.—We say that there was no proper election in the first place. According to the statute, prisoner should have been brought up by the sheriff for election. Here he came voluntarily and without the sheriff. Further, there was no entry of consent to be tried speedily made by the Judge, as required by the 1900 amendment to the Code. They referred to *Rex v. Keefer*, 5 Can. Cr. Cas. 122, 2 O.L.R. 572; *Reg. v. Cameron* (1897), 1 Can. Cr. Cas. 169; *Reg. v. Gibson*, 3 Can. Cr. Cas. 451; *Reg. v. Smith*, 3 Can. Cr. Cas. 467; *Rex v. Breckenridge*, 7 Can. Cr. Cas. 116. The clerk of the peace had no authority to make the entry required by the statute; it should have been made by the Judge.

Per Curiam.—We consider your points altogether too technical and we are against you on both.

Henderson, proceeding.—Then we proceed to the third point: Where the theft is by a petty officer in the navy on Admiralty territory, such as the Imperial dockyards at Esquimalt, section 8 of the Code prevents a conviction of the accused on the charge of retaining under section 399 of the Code.

[MACDONALD, C.J.A.—What is your contention? That the Court has not jurisdiction?]

Mr. Henderson.—Yes. This is a matter affecting the government of the navy, and is not subject to the jurisdiction of the civil Courts.

[GALLIHER, J.A.—The accused here is not in the navy; he is the receiver of the stolen goods. Your argument would lead you into the impossible position that the receivers of goods stolen from the navy would all go scot free.]

Mr. Henderson.—Why so?

[GALLIHER, J.A.—The naval authorities have no control over this man; they cannot court-martial him; so how is he to be punished?]

[MACDONALD, C.J.A.—Have you any authority for the proposition that where a petty officer in the navy steals naval property in Canada, the Canadian Courts cannot deal with the offender?]

Mr. Henderson.—I have not, but I hope to make some authority for that proposition in the present case.

[IRVING, J.A., pointed out that a murder had been committed on the same premises as these stores are alleged to have been stolen from, and that the murderer was taken into custody there, tried, convicted and hanged by the civil authorities.]

[GALLIHER, J.A.—I do not know what the other members of the Court think, but, speaking for myself, you are wasting time with me.]

Per Curiam.—It is clear that we are all against you on that point also.

Henderson then proceeded with the discussion of the evidence of identification of the goods stolen.

Per Curiam.—It seems from the evidence here that there were a good many unnecessary interruptions to the evidence at the trial. We think that not only should there be less of this undue interruption of the evidence, but that the trial Judges should be more firm and strict in ruling on evidence.

Maclean, K.C., on the same side, on the subject of corroboration, submitted that there was no corroboration.

Aikman, for the Crown, and *Pooley, K.C.*, for the Admiralty, called upon on the question of corroboration: It is submitted that there is ample corroboration. Day paid Reid (the thief) \$24 for the goods. There was an arrangement between Day and Reid by which the goods were left on the wharf; Day took them away, and subsequently Day paid Reid. There is the further fact that Day made a payment to the customs officials in respect of claims made for duty on these goods.

VANCOUVER, November 8, 1911.

Per Curiam.—Leave to appeal should be refused. No case has been made out on which we would be justified in ordering the trial Judge to state a case. This application has been argued very fully; in fact, we have permitted counsel to argue it very exhaustively to see if it was possible to ascertain anything which would justify the granting of an order for a stated case. But it is perfectly clear on the uncontradicted evidence that there is no case; in other words, that it would be hopeless for the prisoner to expect to succeed on a stated case.

Leave to appeal refused.

[COURT OF KING'S BENCH, QUEBEC.]

(Crown Side.)

BEFORE CROSS, J.

PAPILLO v. THE KING.

1. ARREST § I B—7a)—ILLEGALITY—SUMMARY CONVICTION PROCEDURE.

A person illegally apprehended without warrant in a matter triable under the summary conviction procedure cannot demand to be discharged solely on the ground of the illegality of the apprehension; his remedy is by civil action of damages for the unlawful arrest.

[*McGuinnis v. Dafoe*, 3 Can. Cr. Cas. 139, and *R. v. Clarke*, 20 O.R. 642, referred to; Cr. Code (1906), secs. 668 and 724, considered.]

2. JUSTICE OF THE PEACE (§ III—12)—JURISDICTION OVER OFFENCE AND PERSON—IRREGULARITY IN COMPELLING APPEARANCE.

A distinction is to be made between the jurisdiction to take cognizance of an offence and the jurisdiction to issue particular process to compel the accused to answer it (*ex. gr.* a warrant of arrest); and unless a statute specifically requires it, a provision for an information under oath is to be read as merely giving cumulative powers in order to compel the attendance of the accused by the process which it enables the magistrate to issue upon it, and not as a condition precedent to his exercise of his trial jurisdiction upon the accused being brought before him without a warrant in a summary conviction matter.

[*Gray v. Commissioners*, 48 J.P. 343; *R. v. Governor of Brixton Prison, Ex parte Thompson*, [1911] 2 K.B. 82, 27 Times L.R. 350, and *Re Maltby*, 7 Q.B.D. 18, referred to; see also Cr. Code (1906), secs. 654, 711; *Dixon v. Wells*, 25 Q.B.D. 249; *R. v. McNutt*, 3 Can. Cr. Cas. 184.]

DECIDED: 1911.

THIS is an appeal from a summary conviction of the appellant by a police magistrate on a charge of having had a pistol in his possession in violation of section 118 of the Criminal Code, 1906.

CROSS, J.:—No question is raised as to the proof made of the facts, or of the sufficiency of the facts to support the conviction.

What the appellant complains of is that his arrest was unlawfully made, and that, having protested against it before the magistrate, it was his right to have had the complaint dismissed, and he has asked this Court to so decide.

His general proposition is that justice must, in a law Court, be administered according to law. The scope of that general proposition was indicated by Chief Justice Cockburn, in the case of *Martin v. Mackonochie*, 3 Q.B.D., at p. 775, as follows:

It seems to me, I must say, a strange argument in a Court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceedings should be upheld. In a Court of law such an argument *à convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *panam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend it. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself. I cannot, therefore, concur in the view that because the defendant might have defended himself on this summary proceeding, or, if a formal suit had been instituted against him, must upon the facts necessarily have been condemned, therefore the proceeding in question was valid and ought to be upheld. Such reasoning has and can have no place in an English Court of justice. It may be that this summary jurisdiction would be exceedingly useful in order to prevent erratic clergymen from setting the law at defiance, and retaining benefices in a church the rules and ritual of which they habitually disregard, if the legislature should think proper to create it. But its possible utility affords no justification for usurping it, and expediency is a new and I must say to me strange ground to assign for upholding the exercise of assumed judicial authority when it cannot be shewn to exist in point of law. If the effect of our decision will be to enable Mr. Mackonochie to continue to set the law at defiance, I shall greatly regret it; but I cannot allow any such consideration to operate in deciding, not whether rough justice may not have been done, but—what, after all, when looked at judicially is a dry question of

law—whether the sentence we are asked to prohibit has been according to law. At the same time let it not be for a moment supposed that the law is not quite strong enough to deal with and punish such offences, if the right course be pursued. The only question is whether that course, so prescribed by law, may be departed from, and another, unknown to the law, substituted for it. It is obviously a very different thing to treat as contumacy the refusal or omission to do a specific thing which the Court has authority to enjoin, or to treat as such a substantive offence for which the law has itself provided the appropriate treatment. The law constitutes a given act an offence. As such it attaches to it a given punishment. But it prescribes a plenary course of procedure by which, if at all, the offence is to be brought home to a party charged with having committed it. If a Court having jurisdiction over the offence takes upon itself to substitute a different and more summary method of procedure, surely this is to make the Court, as it were, supersede the law.

The inference drawn by the appellant from the general proposition is inevitable and unanswerable, unless there be something, either in the shape of validating enactment or authoritative judicial opinion, to shew that the general principle is not to be applied to declare the consequence of the illegal act here in question, for it does appear that the appellant was arrested by a constable without prior complaint having been made and without warrant, upon the chance or guess that he might have the weapon in his pocket, and it was discovered upon his having been arrested that he did have it.

It is said in Archbold's Criminal Pleading (23rd ed.), at page 407:—

If a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed to hear the charge without any information or summons having been previously issued, unless the statute enacting the offence imposes the necessity of taking some such step (as was the case in *R. v. Scotton*, 5 Q.B. 493, 13 L.J.M.C. 58), and the witnesses, if they swear falsely, will be liable to an indictment for perjury,

Now, it is true that it is provided by section 655 of the Code (made applicable to such a complaint as this one, by section 711), as amended by 8 & 9 Edw. VII. ch. 9—that it is upon receiving a complaint or information and after having considered the allegations of the complaint, and the evidence of his witnesses, if

any, that a justice is to issue a summons or warrant. It is also to be taken as established that, though there are cases in which arrests can be made without warrant, the present is not one of them. Hence the argument that the justice could not lawfully take jurisdiction over the appellant, because of this requirement of a complaint or information and of the absence of compliance therewith.

I consider that this argument does not extend as far as it is sought to make it go, because—as stated in 1 Russell on Crimes, 7th ed., 462:—

Unless a statute specifically requires it, the laying of an information in writing, or on oath, is not a condition precedent to his exercise of jurisdiction, and statutes providing for informations on oath, unless in very special terms, are read as merely giving cumulative powers in order to compel the attendance of an absent person, or to enable a case to proceed *ex parte* if he does not appear.

There is a marked distinction between the jurisdiction to take cognizance of an offence and the jurisdiction to issue particular process to compel the accused to answer it.

Effect was given to the same view recently in England, in an extradition matter in *Rex v. Governor of Brixton Prison*, 27 Times L.R. 350.

It appears to have been held in *Gray v. Commissioners of Customs* (1884), 48 J.P. 343, that an adjudication by justices who have jurisdiction cannot afterwards be disputed by raising objections to the arrest. *Vide also Re Maltby* (1881), 7 Q.B.D. 18.

In deciding the question before me, regard is to be had in particular to certain express statutory provisions, namely, to section 724, which enacts that: "No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form," and to section 668 which, though not specifically made applicable by section 711 to summary conviction procedure, nevertheless affords a strong basis for argument by analogy, in that it authorizes or rather commands a justice to inquire into matters charged against a person who is before him, "whether voluntarily or

upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence."

First, as to the effect of section 724, which provides that no objection shall be allowed to any complaint, summons or warrant for any alleged defect therein not simply of form, but in substance, it appears to me that if a paper is defective in something which is of the substance of a warrant, it cannot be a valid warrant. A warrant defective in form may still be a warrant, but a warrant defective in substance cannot in law amount to a valid warrant, for it admittedly lacks substance. It follows that an accused person may be brought before a justice by virtue of something so defective that it does not amount to a warrant; and yet the objection to it is not to prevail or prevent the justice from proceeding. The idea would seem to be that, being before a justice, no wrong will be done there to the party charged.

Secondly, as to the effect of the analogy from section 668, it may be said that if the authority of the justice were confined to the matter of the charge upon which the defendant had been apprehended, there would be plausible ground for saying that the words "apprehended without warrant" in this section, could relate only to cases in which arrest without warrant was made permissible by the Code, but when it is seen that the Code provides that the justice is to inquire into the matter of "any other offence," there can be no other conclusion than that no inquiry whatever need be made into the mode or machinery in virtue of which the defendant has come to be before the justice. The justice having thus been given jurisdiction over the defendant, the subsequent adjudication (being made with jurisdiction) is not to be disputed by an attack upon the proceeding of arrest, a thing to which the justice need pay no attention.

The legal consequence would be that the party is left to his action of damages for the unlawful act practised upon him, and that, though in general entitled to be dealt with throughout "according to law," that general rule has its application displaced in so far that a person, illegally apprehended with-

out warrant in a matter triable under the summary conviction procedure, cannot demand to be discharged solely on the ground of the illegality of the apprehension.

Reference may be had to: *R. v. Clarke*, 20 O.R. 642; *McGuinnis v. Dafoe*, 3 Can. Cr. Cas. 139, and to other cases cited in Seager's Mag. Man., p. 256. The appeal is dismissed.

Appeal dismissed.

[COURT OF APPEAL, MANITOBA.]

BEFORE HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON, AND
HAGGART, J.J.A.

Re McMICKEN.

1. MAGISTRATES (§ II—20)—DUTIES—FINDING GUILT OF ACCUSED—GATHERING FACTS SURROUNDING CRIMINAL ACT TO FIX PENALTY.

The duties of a magistrate who undertakes to dispose of a matter brought before him are two-fold: first, to find if the party is guilty or not guilty of the charge, and secondly, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed. (*Per Howell, C.J.M.*)

2. CRIMINAL LAW (§ II A—30)—RIGHT OF PRIVATE PROSECUTOR TO BE HEARD AT TRIAL.

Where a prosecution for a criminal offence was instituted by a private prosecutor and he is still in charge of the prosecution, he has the same right to be heard on the trial, both as to the question of guilt and the quantum of punishment as the Attorney-General would have on a Crown prosecution.

[Stephen's History of the Criminal Law, 419, 495, referred to.]

3. CRIMINAL LAW (§ II A—33)—CRIMINAL INFORMATION AGAINST MAGISTRATE—DISCRETION.

It is within the discretion of the Manitoba Court of Appeal to order a criminal information to be exhibited against a magistrate for alleged unlawful conduct in the discharge of his duties.

[As to proceedings by criminal information generally, see Annotation to this case.]

4. CRIMINAL LAW (§ II A—33)—CRIMINAL INFORMATION AGAINST MAGISTRATE FOR ILLEGAL ACTS—CORRUPT MOTIVE ESSENTIAL.

Though it appears that a magistrate was guilty of illegal acts in the performance of his duties, a criminal information will not be ordered to be exhibited against him unless it is made to appear that he did such acts from corrupt motives.

5. CRIMINAL LAW (§ II A—33) — PROCEDURE — MAGISTRATE — EXCESS OF AUTHORITY.

A magistrate has no right to dispose of a case before the hour set for trial in the absence of the prosecutor, although the accused appears before him and pleads guilty.

6. MAGISTRATES (§ II—20)—RIGHT OF MAGISTRATE TO HEAR EVIDENCE IN MITIGATION OF OFFENCE WHERE PLEA OF GUILTY ENTERED BUT WHERE PROSECUTOR NOT PRESENT.

A magistrate before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, even where the accused pleads guilty to the crime charged, has no right to hear evidence in mitigation of the punishment without giving the private prosecutor having charge of the prosecution an opportunity to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances. (*Per* Richards, J.A.)

7. MAGISTRATE (§ II—20)—MISCONDUCT—BRINGING ON CASE BEFORE HOUR SET—CORRUPT MOTIVE.

Though a magistrate acts beyond his jurisdiction in bringing a case on before the hour fixed, such action will not be taken as indicative of a corrupt motive if it appears that the magistrate did not know the hour for which the trial of the case had been fixed and had taken the case at the earlier hour for the convenience of counsel for the accused, where the magistrate erroneously supposed that it was not necessary to have the prosecutor represented at the hearing, as defendant's counsel had informed the magistrate that the accused person would plead guilty and the accused did so plead at the hearing.

DECIDED: December 6, 1912.

MOTION to make absolute two rules *nisi* calling upon Alexander McMicken, provincial police magistrate for the province of Manitoba, to shew cause why a criminal information should not be ordered to be exhibited against him for certain alleged misdemeanours charged as having been committed by him while acting as such police magistrate.

W. H. Trueman, for the applicant.

C. P. Fullerton, K.C., for the magistrate.

HOWELL, C.J.M.:—Mr. McMicken is a police magistrate for the province and holds regular, and, I gather, daily Courts in Winnipeg. He has a regular Court room and a clerk who appears from the affidavits to perform the ordinary business pertaining to that office. The affidavits shew that the clerk knew that the cases in question were to come on for hearing at 11.00 a.m., on the 16th of October, and the day previously he granted subpoenas to one of the prosecutors returnable at that hour. Bain,

the constable who made one arrest, referred to in the affidavit of the magistrate, told one of the prosecutors the day before that the cases would come on for hearing at the hour above mentioned. The clerk of the Court knew when the matters were to come up, the constable who brought the informations to the magistrate to be disposed of also knew this fact. The magistrate's affidavit alone was filed, none was filed of the clerk or constable. It seems strange that the magistrate did not ask his clerk how those matters happened to come before him, and equally strange why the constable did not tell him.

The magistrate in his private room took the plea of guilty from each of these two parties, who apparently came in separately in the absence of the private prosecutor, and apparently at separate times heard each explain that he was intoxicated and inflicted on each the same minimum sentence.

Where a magistrate undertakes to dispose of such a matter, his duties are two-fold: 1st, to find if the party is guilty or not guilty of the charge; 2nd, to gather the facts and circumstances surrounding the criminal act, so that he may judicially find what penalty should be imposed.

In this, as in most criminal cases, a wide range is given for judicial discretion, the accused might have been punished anywhere between the minimum of \$50—that which was imposed—and two years' imprisonment with a fine also of \$200. The decision on this question and the consideration of the facts is as much the magistrate's duty as that of finding the prisoner guilty or not guilty.

The prosecutor had as much right to be heard on this trial as the Attorney-General, and the clear language of Stephen in vol. I., pp. 419 and 495, of the History of Criminal Law, on this subject is interesting.

The prosecutor had gone to the expense and trouble of issuing subpoenas and of employing counsel, and when they appeared at the time when the clerk of the Magistrate's Court told them the cases would be heard they were told by the same clerk that the

cases had been disposed of, but the magistrate refused to tell them when the cases had been heard or what punishment had been imposed. Apparently there were hot words and the magistrate refused to allow the proceedings to be looked at. The rights of the prosecutor had been invaded and his feelings can be imagined.

The accused persons had been caught red-handed in the commission of a crime, and each received the same minimum sentence. According to the magistrate both claimed they were drunk on election day. One might think it interesting to ask from what source the liquor came on a day when it cannot be sold, also to enquire why they chose the names which they sought to vote upon and possibly, who suggested these names; it might be pertinent to ask how many times they had previously voted that day, and generally if they were criminals or were they simply thoughtless young men committing a first offence. Apparently nothing of this kind was enquired into by the magistrate, and he deprived the prosecutor of his legal right to bring out such facts.

After carefully looking into the whole matter, I cannot get rid of the impression that assumed names have been used and that the guilty parties have not a record of conviction against them, and the gross irregularities shewn by the papers filed fill one with suspicion of corrupt intent somewhere.

In the course the magistrate took I think he acted highly improperly and perhaps I might say unlawfully; but he has denied any improper or corrupt intention, and claims that it all arose from want of knowledge of the course to be taken under such circumstances. His course of conduct after the disposition of the case has been urged upon us as evidence of a bad mind and improper or corrupt intent and there is some authority for this proposition.

I think, however, in the face of the direct statement by the magistrate, above referred to, I cannot hold that such a case has been made out that we should order the issue of a criminal in-

formation, which is in the Court's discretion, and particularly so as the prosecutor's rights, if any, are not thereby judicially disposed of.

The rule must be refused, but I have no hesitation in saying that it should be without costs.

RICHARDS, J.A.:—This is a motion to make absolute two rules *nisi* calling upon Alexander McMicken, provincial police magistrate for the Province of Manitoba, and having his office and Court at the city of Winnipeg, to shew why criminal information should not be ordered to be exhibited against him for certain alleged misdemeanours, charged as having been committed by him while acting as such police magistrate.

These matters first came before this Court in pursuance of notices of application for rules *nisi*. On that application rules were refused, no one appearing for the magistrate, and the Court not being satisfied that the service of the notices at the magistrate's residence, though apparently sufficient according to the English practice, had, under the circumstances shewn by the affidavits, given the magistrate six days' actual personal notice of the application.

Afterwards other notices of application for rules *nisi* were served upon Mr. McMicken personally. He did not attend personally or by counsel upon the return of those notices, and the Court granted the rules, making it a condition that it should be open to him on their return to take any objections which he might have taken on the return of the notices.

The facts appear to be: On 12th October, 1912, at each of two polling subdivisions, at an election held to elect a member to represent the electoral district of Macdonald in the House of Commons of Canada, a party was, on the complaint of an agent of one of the candidates, arrested by order of the returning officer, on a charge of having committed the crime of personation.

The parties so charged were taken in custody and lodged in a lock-up at St. James. Apparently they were there admitted to bail by a justice of the peace, and the proceedings against them

were, by a justice of the peace, in some way enlarged to come up before Mr. McMicken at his Court in Winnipeg, on the 16th of October.

It is alleged that the hour fixed by the justice of the peace, who so transferred the matters to be heard at Winnipeg before Mr. McMicken, was 11 o'clock in the forenoon. There is no record before this Court shewing that fact. In each case the private prosecutor was informed of the fact upon inquiry at St. James, or from a St. James constable. It appears that the clerk of the Magistrate's Court, at Winnipeg, was aware of that being the hour, though how he learned it is not shewn.

There is no evidence that Mr. McMicken knew that these charges existed, or had been transferred, to be heard before him, until he heard of them from Mr. Sullivan, which will be referred to later. There is also no evidence to shew that he was aware of the hour at which the transferring justice of the peace had ordered them to come up before him, Mr. McMicken, till after he, Mr. McMicken, had disposed of them as hereinafter mentioned.

On the morning of the 16th at 11 o'clock the two private prosecutors, with their counsel, attended at the Winnipeg Court and were informed that the cases had already been disposed of; that the parties had pleaded guilty and that, extenuating circumstances having been shewn, each of them had been punished by a fine of \$50, and that the fines had been paid.

Thereupon a wrangle took place, and the magistrate refused to permit the private prosecutors and their counsel to take copies of documents in connection with the matter.

The magistrate's own affidavits say that he knew nothing whatever of these cases having been transferred to him for trial or of the hour set for their so coming before him. His story, which has not been contradicted, is that early in the morning of the 16th, Mr. Sullivan, a barrister practising at Winnipeg, telephoned him stating that he would be unable to attend his Court at the usual hour, and that he would therefore like to have two

cases in which he represented the accused, and in which the parties were prepared to plead guilty, dealt with before the usual Court hour.

The magistrate further swears that, acting upon Mr. Sullivan's request, and knowing nothing of the facts as aforesaid, he attended his Court at an earlier hour than his usual one, and that the two cases were brought before him in his private room off the Court room, and that the parties there pleaded guilty and claimed that they had been drunk when committing the crime and had not been aware of the enormity of their offence, and that he thereupon fined each of them \$50, which is the smallest punishment which, according to law, he was at liberty to inflict.

He swears that he had no corrupt or improper motive in acting as he did, and that he believed that in dealing with the cases beforehand and in his private room he was acting within his powers, and that he often took cases in that private room where parties pleaded guilty, and that he supposed that where parties were prepared to plead guilty, it was not necessary that the prosecutors should be present when the case was dealt with.

It is in the discretion of the Court to order the exhibiting of a criminal information such as applied for; but such order will not be made unless it appears that the magistrate was guilty of an illegal act or acts, and that he did such act or acts from corrupt motives.

Sec. 272 of the Dominion Elections Act defines what shall constitute the crime of "personation," and makes the guilty party

liable to a penalty not exceeding \$200, and not less than \$50, and to imprisonment not exceeding two years, and not less than three months.

When the matter was first mentioned to this Court (that is to say on the return of the notices which the Court did not think properly served) counsel for the informants urged, as an illegal act by the magistrate, that the statute compelled not only the imposition of a fine but also of a term of imprisonment which should be not less than three months, and not more than two

years; but, when moving for the rule, he abandoned this ground because of a decision by Mr. Justice Wurtle in *The Queen v. Robidoux*, 2 Can. Cr. Cas. 19, in which that learned Judge held that, although both fine and imprisonment are provided by statute as a penalty yet, because of sec. 1028 of the Code, the Judge may impose one of these penalties only.

The Dominion Elections Act, by sec. 296, says, as to a charge of personation, that the deputy returning officer may, on the polling day, issue his warrant for the arrest of the person charged in order that he may be brought before the magistrate therein named, to answer to the information and to be further dealt with according to law.

Sec. 300 of that Act provides that the magistrate named in the warrant shall be one having jurisdiction under part XVI. of the Criminal Code, and sec. 301 says that the provisions of said part XVI. of the Code shall apply to all proceedings under the Act against persons accused of personation under the seven preceding sections. Those seven preceding sections relate to cases where the accused is charged at the polling station with having committed the crime of personation and is arrested pursuant to the warrant of the deputy returning officer then issued.

Part XVI. of the Criminal Code is one relating to the summary trial of indictable offences, and Mr. McMicken is a magistrate who has power under part XVI. to try such cases as are therein provided for.

Sec. 787 of the Code, which is included in part XVI. says:—

Every Court held by a magistrate for the purposes of this part shall be an open public Court.

Sec. 680 of the Code, which is included in part XIV., referring only to preliminary inquiries in the case of charges for indictable offences, says that:—

The justice may order the accused person to be brought before him . . . at any time before the expiration of the time to which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order.

That only refers to the case where a person is in custody, and

probably is only for the purpose of enabling bail to be taken. I can see in it nothing to justify the justice's hearing and dealing with the matter in the absence of the private prosecutor in a case under Part XVI. of the Code.

If there are other provisions of the Code under which the magistrate might suppose he had power to act as he did, they were not called to our attention by his counsel, and I do not know of them. Secs. 644 and 645, providing for the exclusion of the public at trials in certain cases, have no bearing on such a case as this.

There can be no doubt, I think, that, in dealing with the matter as he did, the magistrate exceeded his authority. In addition to the provision of sec. 787, as to the Court being an open public Court, there is no question that a private prosecutor has a right to be heard, not only as to the commission of the crime, but as to the question of aggravating or mitigating circumstances, to be considered by the magistrate in deciding what punishment he will inflict.

In Stephen's Criminal Law of England, vol. I., p. 494, it says:—

If, as is often the case, there is a private prosecutor, he can and does manage the whole matter as he might manage any other action at law; . . .

The course pursued is precisely the same in all cases, and whoever may be the prosecutor. A prosecution for high treason, conducted by the Attorney-General, differs in no one particular in matter of principle from the prosecution of a servant by his master for embezzling half-a-crown.

And at page 495, it is said:—

Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else.

It is of the utmost importance that Courts should be held openly, and that parties, preferring charges, should have a right to be present when the same are dealt with. In the present case the magistrate should have waited for the arrival of the private prosecutor, at least until the hour fixed for the hearing, and if he did not know the hour, as he says he did not, he should have

ascertained it and have seen that it had gone past before dealing with the case in the prosecutor's absence.

The magistrate endeavours to meet this by saying that he did not suppose that when parties were prepared to plead guilty it was necessary to have the prosecutor present. It was stated by counsel for the magistrate, although not proved by affidavit, that it is customary to deal, in Magistrate's Courts, with cases where a party is willing to plead guilty, by accepting that plea before the hour fixed for the hearing of the case. If cases are so dealt with in the absence of the private prosecutor, the so doing ahead of the time fixed for the hearing is a wrongful act on the part of the magistrate. It seems to me that if there have been such cases they must have been cases where the police had laid informations and were acting as the prosecutors, and where someone representing the police was present at the time the cases were so brought on in advance of the fixed hour.

In any case, the magistrate, before exercising his discretion as to the extent of the penalty to be imposed, within the limits provided by law, had no right to hear evidence in mitigation of the punishment without giving the private prosecutor a chance to hear that evidence and cross-examine the parties giving it, and, if necessary, meet it with evidence on his own part in aggravation of the offence, or in contradiction of the alleged mitigating circumstances.

But, as stated above, the fact that the magistrate has acted beyond his jurisdiction and committed an illegal act does not, of itself, empower this Court to grant the extraordinary remedy here asked for. The evidence must be such as to make at least a *prima facie* case of corrupt motive. We can only act on the material in the affidavits and papers before the Court. There is nothing in that which suggests any reason why the magistrate should try to favour the accused or that he acted from fear.

What appears from that material to be relied on as evidence of corrupt motive is, first, the fact of the magistrate having acted beyond his powers in hearing the case before the hour

fixed for hearing, and secondly, the wrangle which took place after the prosecutors and their counsel arrived at the Court room.

Dealing first with the question of the wrangle. That took place, not at the trial of the case, but after it was over and the matter had been dealt with by the magistrate. I have been unable to find any case which shews that a wrangle under such circumstances is evidence of a corrupt motive.

It is stated in Archbold's Criminal Pleading that in the case of *The King v. Manley, Rowe*, Interesting Cas. 646, a corrupt motive was found by the Court from the magistrate abusing the prosecutor. The report of that case is not available here; but I can only think that it must refer to unprovoked abusive language used by the magistrate during the trial or hearing. If so, it is not an authority in a case where the wrangle does not occur until after the case has been disposed of.

I am unable to find a corrupt motive from the bringing the case on before the hour fixed, though the magistrate, I think, acted beyond his jurisdiction in doing so. As above stated, he says that he knew nothing of the particulars of these cases until spoken to by Mr. Sullivan, and until he came into the Court, and that he never knew the hour at which they had been adjourned to come up before him. I have been unable to find in the meagre records of the case that were before him anything shewing this hour; so that, when the matter was brought hurriedly before the magistrate, there was, apparently, nothing to draw his attention to the hour, and his action in the hurry of the moment, if he believed he had the power to act as he did cannot be held to shew a bad mind.

Magistrates are not expected to know the law as certainly as Judges would be expected to know it, and where, in spite of their appearing to have acted wrongfully, it is not shewn that their motives were corrupt, Courts will not assume that corruption on their part merely from the fact of their having made mistakes in the law.

In dealing with cases of this kind Courts have always laid

a good deal of weight on the magistrate's statement of the absence of improper motives. Where the case is otherwise not strong, and, particularly, where it is possible that the magistrate has made a *bonâ fide* mistake as to his powers, Courts have held that no information shall be ordered to be exhibited, as the remedy sought is an extraordinary one, and the informants have the right to proceed by indictment in the ordinary way if they choose.

I am of opinion, therefore, that the rules should be discharged.

It has been argued that the magistrate should be ordered to pay the costs. As in my opinion the application fails, I do not think that he should.

On the other hand, as the magistrate acted beyond his powers, no costs should, in my opinion, be awarded him. Besides, it was in his power, when served with the notices prior to the issue of the rules, to appear personally or by counsel upon the return of those notices, and to there raise all questions that by his counsel he afterwards did on the return of the rules *nisi*. He chose to not follow that course. If he had there given the explanation and denial of corrupt motives that he afterwards gave on the return of the rules, those rules would not, I think, have been granted.

PERDUE, J.A.:—A rule *nisi* was granted on 4th November, 1912, calling upon Alexander McMicken, a police magistrate of this province, to shew cause why a criminal information should not be exhibited against him. The charge contained in the rule *nisi* is that he unlawfully, maliciously, wickedly and corruptly, and contrary to his duty as said police magistrate, dealt with and disposed of a certain information laid by one Hugh MacKenzie against a person then unknown to the informant, charging such person with the crime of personation at an election of a member to serve in the House of Commons, at a time prior to that fixed for the hearing of the charge, and in the absence of and without the knowledge of the informant. A

similar rule *nisi* was also granted against the same magistrate, making a similar charge in reference to the disposition by him of another information laid by one Richard H. McDonald, charging one Tom Morris with the crime of personation at the same election. A motion has been made in each case to make the rule absolute and the magistrate has, by his counsel, appeared and shewn cause, the two motions being argued together.

The facts as they appear to me to be important are as follows:—

On 12th October, 1912, an election was being held in the electoral district of Macdonald for the election of a member for that district to serve in the House of Commons of Canada. Hugh MacKenzie, of Winnipeg, barrister-at-law, was the agent of one of the candidates at one of the polling divisions. A person whose name and identity were unknown to him attempted to personate one of the qualified electors on the list by applying for a ballot paper in the name of such qualified elector. MacKenzie thereupon swore out an information before the deputy returning officer, charging the party in question with the offence of personation, and a warrant was issued under which the alleged personator was arrested and lodged in the jail at the police station at St. James.

At another polling division a similar charge was laid by McDonald against another alleged personator, who gave his name as Tom Morris, and he also was arrested and lodged in the same jail. Both of the accused persons were on the same day released on bail by S. D. Richardson, a justice of the peace. The recognizances of bail accepted by Mr. Richardson and on which the accused were released were produced, attached to the informations. These shew that no time or place was specified at which the accused were to appear and the offence with which they were charged was not mentioned. The recognizances appear to have been hurriedly and negligently prepared. One is headed Re "George Stout." The quotation marks appear in

the original and apparently indicate doubt whether the name was real or assumed. In this recognizance it is declared that Fred Adams and John Nolan, both of Winnipeg, were bound in the sum of \$250 each, said sums to be levied to the use of the King,

if he, the said Tom Morris fails in the condition hereunder written (or endorsed hereon).

The other recognizance is headed Re "Tom Morris," again using quotation-marks, and the same sureties bind themselves in similar sums to be levied "if he the said George Stout fails, etc." The pretended recognizance taken in the Stout case was for the due appearance of Morris, and that in the Morris case was for the due appearance of Stout.

No condition was underwritten on either of the recognizances. In each case there is a form printed on the back of the recognizance and intended to be filled up, to shew the offence charged, the day to which the case was adjourned and when and where the accused is to appear, in default of which appearance the recognizance is to be enforceable against the sureties. This form was left completely blank, nothing whatever being written into it. There was, therefore, no time or place specified at which either of the accused persons was to appear, and there was no condition in either recognizance for the breach of which the sureties could be held liable. For all purposes the pretended recognizances might have been mere blank paper.

On Monday, 14th October, McDonald was informed by James Bain, chief of police for the municipality of Assiniboia, and keeper of the jail at St. James, that Morris had been admitted to bail and had been remanded to be tried on 16th October, at 11 o'clock in the forenoon, and he was on the 15th October again told by Bain that the *Morris* case would come up for trial before police magistrate McMicken at the Police Court, Winnipeg, on the following day at 11 a.m. On 15th October, Bain informed MacKenzie and his counsel, Mr. Trueman, that Stout had been remanded for trial before Alexander McMicken,

police magistrate, at the provincial Police Court at Winnipeg, on 16th October, at 11 o'clock in the forenoon. On the 15th October, MacKenzie and his counsel were informed by the clerk of the said Police Court that the case against Stout was coming before that Police Court on the 16th October, at the hour above mentioned. At the request of MacKenzie and his counsel subpoenas were issued for witnesses who were required to give evidence on the charge, and these subpoenas were prepared by said clerk commanding the attendance of witnesses at the said Court on 16th October, at 11 o'clock in the forenoon.

On the morning of 16th October, MacKenzie and McDonald appeared at the said Police Court about fifteen minutes before 11 o'clock and were then informed that the magistrate, Alexander McMicken, had already disposed of the cases. The accused persons had appeared before Mr. McMicken in his private room shortly after ten o'clock and had pleaded guilty to the charge in each case. The magistrate had then imposed a fine of fifty dollars upon each offender, this being the lowest penalty permitted by the statute. At or soon after 11 o'clock Mr. Trueman, counsel for the prosecutors, stated to the magistrate, who was then on the bench, that he appeared on behalf of the informants, and was ready to proceed with the charges. The magistrate told him that he had already tried the cases. A conversation then took place between Mr. Trueman and the magistrate and between the latter and MacKenzie, which is set out in full in the affidavits made by MacKenzie, McDonald and Fairlie, a newspaper reporter who was present. The magistrate has filed an affidavit in which he denies two of the statements attributed to him, but states that it was impossible for him "to remember verbatim what took place on the occasion in question." He admitted that he was very angry at the time. The clerk of the Court and other persons appear to have been present during the conversation, but no affidavit has been produced from any of these persons to corroborate the magistrate's statement as to what took place. The weight of evidence, therefore, is that the magistrate made all the statements attributed to him in the affidavits of MacKenzie, McDonald and Fairlie.

It is clear that the magistrate refused to furnish to the prosecutors or their counsel information as to the amount of the fines he had imposed on the offenders, or to give the reason why he had disposed of the cases before the time fixed for the trial, and in the absence of the prosecutors. When MacKenzie, one of the prosecutors, persisted in asking why his case had been heard in his absence and before the time fixed for trial, the magistrate ordered him to "shut up" and threatened him with arrest. The account given in the affidavits filed by the applicants shews that the magistrate used unseemly language during the above conversation, and acted improperly in withholding information to which the prosecutors were entitled. The conversation took place so soon after he had dealt with the charges that it may be regarded as part of the same transaction, for the purpose of shewing the magistrate's state of mind and of enabling us to form an opinion as to whether he was influenced in his judicial determination of the cases by any improper motive, such as prejudice against the prosecution or a desire to favour the accused.

The charge against the magistrate is that he acted unlawfully, maliciously, wickedly and corruptly and contrary to his duty as said police magistrate,

in hearing and disposing of the aforesaid informations and charges at a time prior to the time fixed for hearing and at a time unknown to the informants and in the absence and without the knowledge of the informants. The question raised upon this application is,

not whether the act done might upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error;

per Abbot, C.J., in *Rex v. Borron*, 3 B. & Ald. 432, 434; see also *Regina v. Badger*, 4 Q.B. 468; *Re Fentiman*, 4 Nev. & M. 126; 2 A. & E. 127. A criminal information has been granted where a magistrate has been shewn to have acted from political prejudice or resentment: *Rex v. Williams*, 3 Burr. 1317; *Rex v.*

Hann et al., 3 Burr. 1716. It is the duty of the magistrate to act fairly between the parties, and if he shewed partiality, in the sense of giving an unfair advantage to one litigant party over another, he would be guilty of a breach of duty: *Regina v. Badger*, 4 Q.B. 468, 473. But whenever it appears that the magistrate acted honestly and uprightly, even though he mistook the law, no information will be granted against him.

The excuse that the magistrate offers for his action is that on the morning of 16th October, a telephone communication was sent to him by Mr. Sullivan, a lawyer, who appears to have been acting for the accused parties, requesting the magistrate to attend at his Court room at about nine o'clock, as he, Sullivan, had some important cases he wished to get disposed of. The magistrate arrived at the Police Court at about twenty minutes after nine o'clock. He then received the papers relating to the cases from Bain, the chief of police. The accused persons soon after appeared, accompanied by Mr. Sullivan, and the magistrate then disposed of both cases in the absence of, and without notice to the prosecutors. The entry of conviction in each case purports to have been made at 10.30 o'clock.

The only explanation offered by the magistrate for proceeding in this hasty and unusual manner was, that Mr. Sullivan said he had another appointment and was anxious to have the cases disposed of as speedily as possible. The magistrate states that he had no knowledge of the cases until the papers were handed to him on the morning of the 16th October, and that he did not know that the hearing had been fixed for eleven o'clock on that morning. He further states that he

had no reason to suspect or believe that either the said Richard H. McDonald or the said Hugh MacKenzie had any personal desire, or were in any way interested in being present when the convictions were made, inasmuch as both the accused were pleading guilty.

The magistrate had no reason to believe that the prosecutors were aware that the accused would plead guilty. He knew that both the accused persons were charged with the offence of personation at a Dominion election held a few days previously.

The informations shewed that the charge in each case was laid by a private prosecutor before the deputy returning officer at a polling division, so that the inference was plain that the accused had been detected in the very act of committing the offence and had been then and there apprehended. It should have occurred to the magistrate that the parties in charge of the prosecution might desire to shew that the accused should be dealt with severely as having deliberately planned and knowingly committed the offences. The private prosecutor in each case had a right to be present and take the conduct of the prosecution he had instituted and the magistrate had no right to proceed in his absence: Stephen, *Hist. of Crim. Law*, vol. I., pp. 494-495. The private prosecutor had a right to be present in order to identify the accused and to rebut, if he could, any evidence offered in extenuation of the offence. The minimum penalty was imposed in each case, the reason given by the magistrate being that the accused stated that they were under the influence of liquor at the time. The applicants very justly contend that they were entitled to contradict and disprove this allegation, and to ask for the imposition of a greater punishment.

The magistrate could have ascertained from the clerk of his own Court the hour for which the trials were fixed. He should have ascertained this and he had no right, without the consent of the prosecutors, to deal with the cases before the proper time had arrived. The offences were of a serious nature. They should have been disposed of in open Court and not secretly in the magistrate's private room.

While I am impressed with the view that the magistrate acted improperly, there is still the all important element to be considered, did he so act from a dishonest or corrupt motive such as favouring or shielding the accused? If he had discharged the accused without inflicting any punishment, I would have had no hesitation in deciding that the application for a criminal information should be granted. But he did impose a penalty and, although it was the lowest he could impose under the

statute, that was a matter left to his discretion. I am not satisfied that it has been sufficiently shewn that he so favoured the accused, or was so prejudiced against the prosecutors, that there was not, in fact, an exercise of judicial discretion upon his part, and that he had a fixed intention to treat the offenders as leniently as the law would permit. His improper conduct in disposing of the cases before the time fixed for hearing them, and in the absence and without the knowledge of the prosecutors, may have arisen from a want of knowledge of the legal procedure to be observed, or from a mistaken idea of his powers. Again, the magistrate may have acted honestly and may unwittingly have allowed himself to be used as an instrument in the hands of persons who were aiding, abetting and protecting the offenders.

It is incumbent upon the applicants to shew that the magistrate acted from a dishonest or corrupt motive. As Lord Denman pointed out in *Re Feutiman*, 4 Nev. & M. 126, 2 A. & E. 127, there must be sufficient proof of corruption to warrant the Court in granting a rule for a criminal information against a magistrate, though there may be much that is reprehensible and suspicious in his conduct. I am not satisfied that the applicants have clearly established a case for the granting of a criminal information against the magistrate, and I think the Court should, in the exercise of its discretion, refuse the application.

The rule in each case should be discharged, but without costs.

CAMERON, J.A. (dissenting) :—Magistrates, like other subjects, are answerable to the law for the faithful and upright discharge of their trust and duties. When their conduct is impugned the question is, from what motive the act done has proceeded,

whether from a dishonest, oppressive or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error: *E. v. Borron*, 3 B. & Ald. 432.

That the motive does not spring from interest is not material for if they (the magistrates) acted from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations: *E. v. Brooke*, 2 T.R. 190, 196.

Every public officer commits a misdemeanour who, in the exercise of the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law, made in good faith, is not a misdemeanour within this article. (Article 148 of Burbridge's Digest of Criminal Law (Can.)).

Note in Can. Crim. Cas. 344, and cases there given.

Lord Mansfield said in *R. v. Cozens*, 2 Doug. 427:—

No justice of the peace ought to suffer for ignorance where the heart is right. On the other hand, when magistrates act from undue, corrupt or indirect motives, they are always punished by this Court.

That is to say, if the magistrate makes a mistake honestly from misapprehension of the law, he is answerable to no one. But if he acts in the execution of his duties from any indirect or improper motive, any motive that has not in view the due administration of justice, then he is punishable by the Court.

There are two cases before us, practically identical in circumstances with each other, in which the conduct of a provincial police magistrate is called in question. I deal first with that in which the information was laid by Mr. MacKenzie, agent for one of the candidates at poll No. 2 in the electoral district of Macdonald at the election there held on October 12th last.

On Saturday, October 12, 1912, at polling booth No. 2, in the said electoral district at an election held on that day in that district there appeared before Harry V. Vincent, the deputy returning officer at said booth, a person, who applied to the returning officer in the name of Allan W. Craigie, for a ballot giving the name of Allan W. Craigie and his residence and occupation. Mr. MacKenzie thereupon asked the deputy returning officer to place this person in custody of the poll constable, drew up and swore to an information for personation, upon which the deputy returning officer issued his warrant and placed it in the hands of provincial constable James Bain, who took the said person into custody.

Now, it is not here contended that it was by an accident that

this person happened to know the name of an absentee voter, stumbled fortuitously into the polling booth of the polling division where this absentee voter was entitled to vote and, without knowing what he was doing, asked for a ballot paper giving the name of the absentee voter. The natural inference is that the person so attempting to personate an absentee voter was doing what he did at the instigation of some interested parties who furnished him with the information and directed his movements. It was a matter of design, not accident.

Afterwards on the same day a justice of the peace, named S. D. Richardson, released the person so taken into custody. We find amongst the papers returned by the magistrate, A. McMicken, Esq., with his affidavit, and attached to Mr. MacKenzie's information, a form of recognizance of bail, headed "Re Tom Morris" but containing the name of "George Stout" signed by said Richardson. Inasmuch, however, as the condition of the recognizance is in blank, the recognizance is worthless, and the parties mentioned therein, Fred Adams and John Nolan, were bound to nothing.

So that here we have the accused person referred to as an "unknown person" afterwards identified as Woods in MacKenzie's affidavit, and referred to as "Tom Morris" and as "George Stout" in the alleged recognizance of bail, released upon the bail of no one, not even of himself. All this without notice to the prosecutor.

These papers were produced for the first time on this motion. So that no question has been raised whether the party guilty of personation was designedly or inadvertently released by magistrate Richardson without bail and without notice to the prosecutor.

Mr. MacKenzie went with his counsel, Mr. W. H. Trueman, on Tuesday, October 15th, to St. James, and there saw Police Constable Bain, who told them that Magistrate Richardson had on the evening of October 12th, ordered the release of the accused and remanded him for trial before A. McMicken, Esq.,

provincial magistrate, at the provincial Police Court in the city of Winnipeg on Wednesday, October 16th, at 11 o'clock in the forenoon.

It is not shewn why Magistrate Richardson remanded the case to another magistrate in the absence of the prosecutor. He does not come forward to tell us that he did this of his own motion, nor does he say that he did it at a suggestion from outside. It would not, however, be difficult to draw the inference that he did not act in so extraordinary a manner spontaneously.

Mr. MacKenzie, with Mr. Trueman, went to the provincial police office on October 15th, at 3 o'clock, and they were there told by the clerk of the Court, that the case against the accused would be on at 11 o'clock in the forenoon of the next day. Subpoenas for three witnesses were then prepared, commanding their attendance at 11 o'clock on Wednesday, October 16th.

Mr. MacKenzie attended at the Police Court at 15 minutes to 11 o'clock that day, but was informed that the case had been already disposed of. The clerk of the Court informed Mr. MacKenzie and Mr. Trueman of this also and shewed the written information upon which was endorsed:—

Wpg. October 16th, 1912.

10.30 A.M.

Pleads guilty with extenuating circumstances.

Fined \$50. pd.

According to Mr. MacKenzie, whose affidavit is corroborated by Mr. Fairlie, there then ensued the various questions and answers and statements between Mr. MacKenzie, Mr. Trueman and the magistrate, set out in paragraph 14 of his affidavit, in which he says positively that the magistrate declared that Mr. Sullivan, barrister, had appeared for the prosecution when the case was disposed of.

In Mr. Fairlie's affidavit it is further stated that when the clerk of the Court was about to shew some paper to Mr. Trueman the magistrate said to him:—

Why, you are giving things away. God Almighty, don't shew anything to them.

We are not here and now asked to believe that any of the circumstances antecedent to the trial before magistrate McMicken, viz., the asking by the accused for a ballot paper, the secret release of the accused without bail, or the secret remanding of the case to be heard before magistrate McMicken, was an occurrence wholly accidental in its nature. But we are asked to take it as the truth that the extraordinary action of the magistrate was purely accidental, that it was due to the singular fact that Mr. Sullivan, counsel for the accused, had an engagement at the Court House and wanted to have the case disposed of as speedily as possible. The whole defence comes down to this, that it was owing to Mr. Sullivan's appointment that the magistrate took the arbitrary and improper course he did in dealing with the information (which charged the accused with a most serious offence) summarily, secretly, in the absence of the prosecutor and before the time fixed for the trial.

It is to be noted that we have not been furnished with affidavits from Magistrate Richardson, from Police Constable Bain, from the clerk of the Court or from Mr. Sullivan. All these parties should be produced for examination before this matter can be finally cleared up. At whose request did Magistrate Richardson release the accused without notice to the prosecutor, and remand the case for trial before Magistrate McMicken? How did the police constable acquire his information as to the date of the remand and other matters and what information did he actually afford to the sympathetic ear of the magistrate on the subject of "extenuating circumstances"? On what facts in his knowledge was it that the clerk of the Court informed the prosecutor of the hour fixed for the trial and issued subpoenas returnable at that time? By what reasoning did counsel for the accused persuade the magistrate to dispose of these cases without embarrassing publicity? These and other pertinent questions might have been answered, but they are not.

I must say that I am impressed with the unreality of the names of "George Stout" and "Tom Morris." So inextricably

are they confused in the alleged recognizances of bail that there is ground for the suspicion that they may be both fanciful designations for one and the same man.

The law provides that the Magistrate's Court shall be an open Court. See sec. 714 of the Code, with reference to trials before a justice in case of summary convictions, and sec. 787, in the case of summary trials for indictable offences. "Every Court held by a magistrate for the purposes of this part shall be an open public Court." This was the law before the Code and for obvious reasons.

Criminal matters must be disposed of in the presence of the public and the prosecutor. And even if the accused pleads guilty the prosecutor has a right to be present to adduce evidence bearing upon the question of the severity of the penalty to be inflicted.

Sec. 272 of the Dominion Elections Act provides that

Every person is guilty of personation and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars and to imprisonment for a term not exceeding two years and not less than three months who at an election

(a) applies for a ballot paper in the name of some other person, whether such name is that of a person living or dead, or of a fictitious person.

The variable nature of the punishment that can be inflicted indicates that the magistrate has a discretion to be exercised on the evidence before him. Obviously if the accused offers evidence the prosecutor must be at liberty to controvert it if he can and wishes to do so.

The powers of a private prosecutor are as great as those of the Attorney-General.

No person has any legal power for the collection of evidence, or for its production before the magistrate, or in appearing before the Court by which the matter is finally determined in the one case which the person placed in a corresponding position has not in the other: Stephens, Hist. Criminal Law, vol. 1, 195.

That the prosecution has the right to produce evidence in aggravation appears absolutely clear: *R. v. Bunts*, 2 T.R. 683; *R. v. Dingnam*, 7 A. & E. 593.

It was argued in reply that the proceedings of the magistrate were at most irregular only; that there was no legal evidence of the adjournment until 11 o'clock and that the applicant had failed to make the strong *primâ facie* case, based on direct evidence, required by the authorities: *R. v. Stanger*, L.R. 6 Q.B. 352; *R. v. Willett*, 6 T.R. 294. It was contended that there was here no corrupt motive shewn and there could not have been such because the magistrate could have waited until 11 o'clock and inflicted the same penalty, and it cannot be said that the magistrate acted either illegally or corruptly. Counsel for the magistrate referred to *Ex parte Fentiman*, 2 A. & E. 127, amongst other cases.

In the other case, in which Mr. R. H. McDonald laid the information, a similar state of facts is shewn. Mr. McDonald, acting as agent at the poll No. 4 in said district at the said election, caused the arrest of one Thomas Morris for applying for a ballot paper in the name of Valentine G. Quinn, under a warrant issued by the deputy returning officer. Mr. McDonald saw Police Constable Bain on Monday, who then informed him that the accused had been released on bail. Here the recognizance is headed "Re George Stout" while in the body of it appears the name of "Tom Morris," and there is no condition endorsed. On Tuesday evening Mr. MacDonald was informed by Bain that the case would come up before Police Magistrate McMicken at the provincial Police Court, Winnipeg, on October 16, at 11 o'clock, before which time he was in attendance at that place. The rest of the affidavit of McDonald deposes to substantially the same facts as those set forth in the affidavit of Mr. MacKenzie.

The two cases must obviously be dealt with together.

The following points appear to me of importance:—

1. The magistrate says that one case was disposed of by him shortly after 10 o'clock in the forenoon—the other about 20 minutes past 10. In this he is contradicted by his own memoranda on the papers, which shew that both cases were heard at 10.30 a.m.

2. It appears that the magistrate altered Mr. MacKenzie's sworn information in the absence, and without the consent of the informant. Of this there is no explanation.

3. The statement, positively made by Mr. Fairlie and Mr. McDonald, that the magistrate said to the clerk,

Why are you giving things away? God Almighty, don't shew anything to them

is denied by him though he admits he did say that the clerk had no right to give information without consulting him. The weight of evidence on this point is against the magistrate, who admits in his affidavit that it was impossible for him to remember verbatim what took place.

4. The magistrate denies that he said Mr. Sullivan appeared for the prosecution, but that the other deponents misunderstood him. But that he did say that Mr. Sullivan appeared for the prosecution is positively sworn to by Mr. MacKenzie, Mr. Fairlie and Mr. McDonald. Here again the weight of evidence is against the magistrate.

5. The other statements ascribed to him in the affidavits are practically admitted by him.

6. The magistrate arbitrarily and improperly refused to let the prosecutor have a copy of the information and record. The reason he gives for this refusal was no reason at all. His real motive is left to inference.

7. In answer to the charge that he failed to impose imprisonment as well as a fine, the magistrate says, in his affidavit: "I am not aware, and I deny that it was my duty to sentence the said accused to a term of imprisonment," which may be true, but is irrelevant and disingenuous, as he should have sworn to his knowledge as of the date when he imposed the fine, and not as of the date when he made his affidavit.

8. We have not before us affidavits from Constable Bain, Magistrate Richardson, the clerk of the Police Court, or Mr. Sullivan, all of whom could shed much light on the questions here raised. The absence of these affidavits affords ground for legitimate comment.

9. The fact that there were two cases, not apparently related to each other, disposed of by the magistrate in precisely the same way, practically simultaneously, gives rise to serious considerations. That the magistrate should secretly dispose of one is hard enough to explain and defend, but that he should thus hurriedly get rid of two cases is a difficult matter indeed to apologize for. It is singular that it should have occurred to each of these two offenders to plead the astonishing plea of drunkenness and that such a futile matter of alleged excuse should have been entertained without question. It is likewise singular that each of these two self-confessed criminals should have had with him the sum of fifty dollars, being the exact amount of the fine to be inflicted.

10. In his memorandum in the *Morris* case the magistrate says that the excuse of inebriety there pleaded before him was substantiated by the police authorities; but this he does not repeat in his affidavit. Mr. MacKenzie swears that the magistrate said in the Court room that Constable Bain had told him that the accused was drunk, and that he (MacKenzie) told the magistrate: "But Constable Bain told me that he was sober, and gave no evidence of having been drinking," and that Constable Bain, who was present, said he had made no statement whatever with reference to the accused having been drinking. It is to be observed that we are here without the evidence of Constable Bain. The evidence is against the magistrate on this point.

11. The conduct and language of the magistrate, as set forth in the affidavits, were so violent and tyrannical as to lend some colour to the view that his action in these two matters was dictated by improper motives. Certainly to contend such action was prompted with a view to the due and proper administration of justice seems to me inconsistent with his treatment of the men who were attempting to bring violators of the law to justice.

In addition to the foregoing considerations and conclusions, I think it clear that the real charge against the magistrate, that of disposing of these cases secretly and in the absence of the

prosecutor, is not met by him with any explanation whatever, except the fatuous one of Mr. Sullivan's appointment at the Court House on the morning in question, to which I have alluded.

After a careful perusal and consideration of the material filed, I have come to the conclusion that, in the result, the proceedings before the magistrate were a travesty on the administration of justice, and that there has been made out a *prima facie* case of connivance on his part, by acquiescence and otherwise, and with knowledge of the material facts involved. Upon the material, it is not going far afield to draw the inference that it was the intention of the magistrate to deal with these cases with a minimum of publicity, and with as little damage as could possibly accrue to the self-confessed criminals and their accessories. The evidence before us is such that a grand jury might readily find a true bill upon it. Not until the various parties who have made affidavits and others I have mentioned have been examined in open Court can the issues here raised be finally and satisfactorily determined. The questions involved, viz., that of the sanctity of the ballot and that of the integrity of the magistracy, are of the highest importance and it is in the public interest that the matters in issue should be authoritatively dealt with by a jury.

In my opinion the evidence before us points to a conclusion that the magistrate in the extraordinary and arbitrary course he adopted in these two cases was animated by an indirect and improper motive; that is to say, by a motive having in view something other than the due and impartial administration of justice. This conclusion, however, may be rebutted and overthrown by further evidence. Therefore, there seems good reason why the magistrate himself, whose conduct has been so sharply and so publicly assailed, should, if fully conscious of his own uprightness, have no hesitation in submitting to the test of a trial before a jury of his fellow-countrymen.

In my opinion the rules in these cases should be made absolute.

HAGGART, J.A.:—I have read the reasons of my brother Richards, and I agree with him that the rule should be discharged.

I thought on the original motion that the rule *nisi* should have been refused. Subsequent argument on the motion to make the rule absolute confirmed me in my first opinion.

In a serious proceeding like this stronger evidence than was offered should have been submitted.

One of the grounds of illegality urged on the *ex parte* motion for the rule *nisi* was that under the statute the magistrate was bound to impose imprisonment in addition to the fine. Judicial interpretation, however, supports the decision of the magistrate and on the argument this ground was abandoned by counsel for the informant.

In my opinion there was no evidence of any corrupt or improper motive, nor was there any illegality in the proper sense of the term, unless a mistaken view of an official's duty is an illegal act.

It is true the magistrate lost his temper in the altercation set out in the informant's affidavit, but I cannot say there was no provocation. This altercation, however, took place subsequent to the disposition of the cases in question.

The rule should be discharged.

Rule discharged; CAMERON, J.A., dissenting.

Annotation—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

A criminal information is a written suggestion of a misdemeanour, made either, (1) *ex officio* by the Attorney-General, or (2) filed in the Crown office by special leave on the relation of a private prosecutor proceeding in the name of the Crown.

In Blackstone's Commentaries, vol. IV., 308, such informations are divided into two sorts:—

(1) Those which are partly at the suit of the King and partly at that of a subject, and which are usually brought upon penal statutes. These are limited as to time by 31 Eliz. ch. 5, and are scarcely ever heard of: Bowen-Rowlands on Criminal Proceedings, 2nd ed., 351.

Annotation (continued)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

(2) Those which are only in the name of the King, and which are of two kinds:—

- (a) Those which are truly and properly his own suit, and filed *ex officio* by his own immediate officer, the Attorney-General.
- (b) Those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office.

A "criminal information" must be distinguished from an "information" laid under Summary Jurisdiction statutes or the Criminal Code, where the term is used as synonymous with complaint.

The object of the King's own prosecutions filed *ex officio* are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal function. The objects of the species of information filed by the Master of the Crown Office upon the complaint or relation of a private subject are any gross and notorious misdemeanours, riots, batteries, libels, and other irregularities of an atrocious kind, not peculiarly tending to disturb the Government, but which deserve the most public animadversion: (*R. v. Labouchere*, 12 Q.B.D. 320, where it was held that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons). See also *R. v. The World*, 13 Cox 305; Bowen-Rowlands on Criminal Informations, 2nd ed., 352.

Information differs from an indictment in little more than this: that the one is found by the oath of twelve men, and the other is not so found, but is only an allegation of the officer who exhibits it: Shortt on Information, p. 3. The term "indictment" will not, apart from a statutory meaning expressly given, include "information": *R. v. Slator*, 8 Q.B.D. 267; but by sec. 5 of the Criminal Code of Canada, 1906, finding the indictment includes also exhibiting an information and making a presentment.

In practice, a criminal information will only lie in the King's Bench Division of the High Court (in England) and not in Courts of assize or quarter sessions, but it may be sent by a

Annotation (continued)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

Divisional Court (K.B.D.) for trial in a Court of Assize: *R. v. Russell*, 93 L.T. 407. The proceedings are similar to those on indictment, except that the junior counsel for the prosecution "opens" the pleadings as in a civil case (see *R. v. Russell, ibid.*). And in England there may be an appeal to the Court of Criminal Appeal therefrom.

A criminal information on relation will only be granted in a case of serious misdemeanour, *e.g.*, libels against magistrates, offences against public justice or the public peace. Though theoretically a criminal information will lie in respect of any offence other than treason, or felony, in practice it is only granted in England in cases of misdemeanour; and the English Crown Office Rule 372, now expressly declares that an information by the Attorney-General shall not be for treason or felony, and rule 375 declares that informations may be ordered by the King's Bench Division on the application of a private individual in respect of a misdemeanour.

The granting of a criminal information is discretionary with the Court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the Court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the Court in granting the rule for a criminal information: *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

A party who wants a criminal information must place himself entirely in the hands of the Court. If it appear that the party has put himself into communication with the publisher of the libel, for the purpose of retorting, or with the view of obtaining redress, or has in any way himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused: *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 25, citing *Ex parte Beauclerk*, 7 Jur. 373; *R. v. Heustis*, 1 James 101.

A person alive to the vindication of his character when assailed and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in *R. v. Robinson* (1765), 1 W. Bl. 542, where he said: "There is no precise number of weeks, months, or

Annotation (*continued*)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the Court either during the term next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the Court, to shew cause within the second term; and this, regardless of the fact whether an assize intervened or not: *R. v. Kelly*, 28 U.C.C.P. 35; *R. v. Wilkinson*, 41 U.C.Q.B. 1, at 24.

It is of the highest importance that the relator should in all cases lay before the Court all the circumstances fully and candidly, in order that the Court may deal with the matter: *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 25 (citing *R. v. Aunger*, 28 L.T.N.S. 634, s.c. 12 Cox 407).

There are two things principally to be considered in dealing with such an application: (1) To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; (2) To see whether the offence is of such magnitude that it would be proper for the Court to interfere and grant the criminal information. Both these things have to be considered, and the Court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not: *R. v. Plimsoll* (1873), noted in 12 C.L.J. 227; *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

The Court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into Court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the Court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants: *Per Quain, J.*, in

Annotation (continued)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

R. v. Plimsoll (1873), noted, 12 Can. Law Jour., p. 228, cited by Hagarty, C.J., in *R. v. Kelly* (1877), 28 U.C.C.P. 35.

The Court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature; leave was therefore refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. *Per* Armour, J.: "I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued, and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior": *R. v. Wilson* (1878), 43 U.C.Q.B. 583. In that case Cameron, J., said: "There is no real necessity, so far as I am aware, for anyone seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging anyone who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charges or imputations." Hagarty, C.J., added that it was not to be understood that the Court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith: *Ib.* reporter's note: *R. v. Wilson* (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge, otherwise the affidavit will be held insufficient: *R. v. Edward Whelan* (1863), 1 P.E.I. Rep. 220, *per* Peters, J.

In Trinity Term, 1876, an application was made for a criminal information for libel in newspapers published on 23rd and 30th

Annotation (*continued*)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

March and 25th May. The delay in not applying to the Court during Easter Term, or until 30th August, was not satisfactorily accounted for, and the Court refused the application, but, in view of the virulent language of the article, without costs: *R. v. Kelly* (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they trusted to be reliable and trustworthy; that the Globe newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the Court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of a matter not pretended either to be not libellous, or to be true in fact: *R. v. Thompson* (1874), 24 U.C.C.P. 252.

Quære, whether a criminal information is the course to be adopted for wilful and corrupt misconduct of a Judge holding an inferior Court of record: *R. v. Ford* (1853), 3 U.C.C.P. 209, 218.

Where there is foundation for a libel, though it falls far short of justification, an information will not be granted: *The Queen v. Biggs*, 2 Man. L.R. 18.

A party seeking a criminal information against another must himself be free from blame, or he will not be granted leave to take that method of procedure, and will be left to his recourse by indictment or action: *R. v. Edward Whelan* (1863), 1 P.E.I. Rep. 223, *per* Peters, J.; *R. v. Lawson*, 1 Q.B. 486; *R. v. Biggs*, 2 Man. L.R. 18.

Every public officer commits a misdemeanour who, in the exercise, or under colour of exercising the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act, or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law made in good faith is not a misdemeanour: *Burbidge Digest of Crim.*

Annotation (continued)—Criminal law (§ II A—33)—Leave for proceedings by criminal information.

Law (1890), article 148; *R. v. Wyatt*, 1 Salk. 380; *R. v. Bembridge*, 3 Doug. 327, and 22 St. Tr. 1-159; Bacon Abridgment, tit. "Office and Officer," N.; *R. v. Borron*, 3 B. & Ald. 434; Annotation, 11 Can. Cr. Cas. 344. If the illegal act consists of taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken, the offence is called "extortion": *R. v. Tisdale*, 20 U.C.Q.B. 272; *Parsons v. Crabbe*, 31 U.C.C.P. 151.

The statutory provisions of the criminal law relating to offences against the administration of law and justice are to be found in Part IV. of the Criminal Code of Canada, 1906, secs. 155-196.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE HUNTER, C.J.

THE KING v. DANIEL.

1. INDICTMENT, INFORMATION, AND COMPLAINT (§ I—3)—LEAVE OF COURT—CRIMINAL LIBEL.

Only in rare cases will the court grant leave to prefer an indictment for criminal libel at the instance of a private prosecutor who has not been bound over at the preliminary inquiry.

DECIDED: May 6, 1912.

It appearing that the private prosecutor had not been bound over at the preliminary hearing to appear and give evidence,

S. S. Taylor, K.C., applied at the Assizes for an order directing the indictment to be preferred for criminal libel.

R. R. Maitland, who appeared for the Crown, stated that he had been instructed not to take any part in the prosecution.

HUNTER, C.J.:—The function of the Judge is not to initiate prosecutions, but to try them. It is only in rare cases, such as where he is an eye-witness of a breach of the law, that he should initiate a prosecution, and even then, with the exception of contempts of the Court, he should not be the trial Judge.

Order refused.

N.B.—*Maitland*, for the Crown, was subsequently instructed to prefer the indictment.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE MACDONALD, C.J.A., IRVING, AND MARTIN, JJ.A.

THE KING v. HARVIE.

1. APPEAL (§ I C—25)—RIGHT OF APPEAL — CRIMINAL CASES — ESTREAT ORDERS.

Whether or not the process in execution thereof is civil and not criminal process, the order of estreat made by a county judge presiding in a criminal court on the forfeiture of bail given for the appearance of the accused before a magistrate in proceedings under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, is in itself a proceeding in a criminal matter, and no appeal lies therefrom to the Court of Appeal (B.C.)

[*Re Talbot's Bail*, 23 O.R. 65; *R. v. Creelman*, 26 N.S.R. 404, and *R. v. Starkey*, 7 Man. L.R. 490, distinguished.]

DECIDED: January 7, 1913.

APPEAL by the bail from order of McInnes, Co.J., estreating the bail bond of the appellants.

The appeal was quashed.

A. J. Kappele, for the bail.

J. S. MacKay, for the Crown.

MACDONALD, C.J.A.:—This is an appeal from the order of McInnes, Co.J., intituled in the County Court Judges' Criminal Court estreating the bail bond of the appellants which had been certified by a police magistrate to be forfeited by the non-appearance before him of one Captain Graham Harvie at the time fixed for the hearing in proceedings then pending against the said Harvie.

The preliminary objection was taken that there is no appeal from such an order to the Court of Appeal. I am of opinion that this objection must be sustained. All the proceedings down to and including the order of estreat, were in a criminal cause or matter, and were taken and had in criminal Courts, namely, the Magistrate's Court and the County Court Judges' Criminal Court. Neither the Criminal Code nor the Fugitive Offenders' Act, nor other federal legislation, gives a right of appeal in cases

like the present. The Court of Appeal Act, R.S.B.C. 1911, ch. 51, does not extend to criminal causes. That extradition is a criminal cause or matter has already been decided by this Court in *Re Tiderington*, 19 Can. Cr. Cas. 365, 5 D.L.R. 138, 17 B.C. R. 81.

Re Talbot's Bail, 23 O.R. 65, decides only that the process of execution after estreat is not invalid because issued out of a civil Court. Reading the sections of the Code relating to the estreatment of bail and execution thereunder, which in the event of *nullâ bona* authorizes the taking of the body of the debtor, I should hold that it would not be irregular to let even the process in execution issue out of a criminal Court. It is, however, only necessary here to say that it is nothing in connection with the process of execution that is complained of, but the proceedings leading up to and including the order of estreatment, all of which were in a criminal Court. That being so, I think an appeal does not lie to this Court in virtue of the provisions of statutes which authorize appeals in civil cases.

The Queen v. Creelman, 25 N.S.R. 404, was relied on by Mr. Kappeler as an instance of an appeal to the Court *en banc* in a case like the present, but that was not an appeal at all, but a review by the Court of its own process. It was a case like *Re R. E. Sproule* (1886), 12 Can. S.C.R. 140. The same remark applies to the Manitoba case of *Reg. v. Starkey*, 7 Man. L.R. 489.

I would quash the appeal.

IRVING, J.A.:—This is an appeal from the order of His Honour Judge McInnes, estreating a bail bond given to secure the appearance of one Harvie, a fugitive arrested under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, after an adjournment of the extradition proceedings, which were had before the Vancouver police magistrate.

By sec. 11 of the Act it is provided:—

A fugitive, when apprehended, shall be brought before a magistrate, who, subject to the provisions of this Act, shall hear the case in the

same manner and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction.

On the 25th February, 1912, Harvie, with two sureties, Jones and Richardson, entered into a recognizance in large sums to be levied of their several goods and chattels if he, the said Harvie, failed in the condition following. The condition recited the fact that the accused was charged, and that the examination of the witnesses had been adjourned until the 4th of March, and then went on to provide that Harvie should "appear on the 4th March," "and on each adjournment thereof until the final disposition of this case . . . to answer further to the charge and to be dealt with according to law."

After these recognizances had been entered into, numerous remands were made, sometimes on the application of the Crown, sometimes on the prisoner's application; and on one occasion at any rate he was remanded by the police magistrate for a period longer than seven days. As to remanding beyond statutory period when on bail, see note E, on p. 319 of vol. 9 of Halsbury's Laws of England. This remand, we are informed, was made with the consent of prisoner's counsel. The prisoner's counsel denies that he ever gave any consent. It seems to me we must accept the magistrate's statement: *Rex v. Ball*, 9 Can. Cr. Cas. 509. The proceedings seem to have been conducted in a happy-go-lucky way, the prisoner not appearing in Court, on the various remands, and finally it was learned that he had gone to England.

On the 25th June, 1912, the police magistrate endorsed the following certificate on the recognizance:—

I hereby certify that the said Captain Graham Harvie has not appeared at the time and place in the within condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

H. C. SHAW,
Police Magistrate.

June 25th, 1912.

Mr. Kappeler appeared and opposed the action of the magistrate, who at that time appeared to think that he had the power

to estreat the bail. Later on application was made to the clerk of the County Court Judges' Criminal Court, who signed the list of forfeited recognizances, and afterwards application was made to His Honour Judge McInnes, who made the order now appealed from. The sureties had no notice of the application to the County Court Judge.

The grounds of appeal are:—

(a) That no notice of application to the said County Court Judge was given to either F. M. Richardson or Walter Jones, the bondmen above mentioned, or to their solicitor.

(b) The said recognizance should not have been declared forfeited and estreated, as the said Graham Harvie was released from his recognizance by the action of Magistrate Shaw, before whom the said Graham Harvie appeared, in adjourning the action against the said Graham Harvie for a period longer than that permitted by the provisions of the Fugitive Offenders Act under which the said Graham Harvie was apprehended.

In this case the recognizance is for something to be done in the Magistrate's Court. His certificate shews that this something was not done. By sec. 1097 (2) this certificate is *prima facie* evidence of non-compliance with the condition. If that certificate is to be reviewed, such review, in my opinion, must be brought about by *certiorari*.

Sec. 1097 provides for the transmission of the recognizance to the proper officer. In this province the proper officer is the clerk of the County Court having jurisdiction at the place where the recognizance was taken. After that has been done the matter becomes the collection of a debt due to the Crown. It is to be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited by such Court: sec. 1099.

The roll having been made out by the clerk, is by him (sec. 1105) transmitted to the sheriff with a writ of *fi. fa.* and *capias*, form 74, a conditional writ, if one may use that expression. The form contemplates a day being named as return day, whereon the person named therein can appear and raise any point he likes. By sec. 1109 provision is made for hearing the case on

the return day by the Judge, and by sec. 1110 the Judge is authorized to relieve in the case of hardship. The procedure is very much the same as that laid down in 1822 by 3 Geo. IV. ch. 46, secs. 1109 and 1110, being reproductions of secs. 5 and 6 respectively. In the present case the officer in charge of the collection of this recognizance was not satisfied with the clerk's list, but applied to the Judge for an order. The same course was followed in *Reg. v. Justices of West Riding* (1837), 7 A. & E. 583, a *certiorari* case, and although it was there contended that the making of this order was mere surplusage in that it only confirmed what the clerk was bound to do, the Court set it aside. The order in this case declares the recognizances estreated, and directs that an unconditional writ of *fi. fa.* and *capias* be issued instead of a writ in the form No. 74.

On the question of jurisdiction, I think the statutory provision in sub-sec. 2 of sec. 1099, directing the County Court to enforce and correct the recognizance in the same manner as any other fines in the same Court, would give the person aggrieved an appeal to this Court under the Provincial Court of Appeal Act from any order made by a Judge of the County Court; but as the order of the 26th of July, 1912, was made in the County Court Judges' Criminal Court, the appellant's proper course is either to apply to the County Court Judge himself to discharge the order as improvidently made, or to have it quashed on *certiorari* proceedings. No jurisdiction has been given to this Court to deal with an order by a Judge of the Criminal Court.

MARTIN, J.A.:—I concur with Macdonald, C.J.A.

Appeal quashed.

[SUPREME COURT OF CANADA.]

BEFORE DUFF, J., IN CHAMBERS.

Re DEAN.

1. **THEFT (§ I—11)—WITH BREAKING AND ENTERING—CR. CODE 1906. SECS. 11, 460.**

The offence of breaking into a counting-house and stealing money therefrom as declared by the English statute 7-8 Geo. IV. ch. 29, sec. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and remains in force under Cr. Code sec. 11, subject to the change made by the Criminal Code as to the nature of the punishment.

[See Cr. Code, sec. 460.]

2. **COURTS (§ III H—241)—SUPREME COURT (CAN.)—HABEAS CORPUS JURISDICTION.**

A judge of the Supreme Court of Canada has concurrent jurisdiction with provincial courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. (1906) ch. 139, sec. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament.

[*Re Sproule*, 12 Can. S.C.R. 140, applied.]

DECIDED: February 25, 1913.

APPLICATION for writ of *habeas corpus*.

The application was refused.

J. Travers Lewis, K.C., for the applicant.

E. F. B. Johnston, K.C., for the Attorney-General for British Columbia.

DUFF, J.:—I think I have no jurisdiction to entertain this application. It will not be necessary, in view of my opinion as to the construction of sec. 62 of the Supreme Court Act, to decide the point raised by the contention of Mr. Johnston, on behalf of the Attorney-General of British Columbia, that that enactment is beyond the competence of the Parliament of Canada.

Sec. 62 is as follows:—

62. Every Judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court.

The language indicates an intention on the part of Parliament to confer only a strictly limited jurisdiction. Anything like frequent interposition in the administration of the criminal law in the provinces by the Judges of the Supreme Court of Canada, through the instrumentality of the writ of *habeas corpus*, would obviously lead to the most undesirable results; and before exercising the authority in a given case, I think it is my duty to scrutinize most carefully the terms in which that authority is given, to ascertain whether or not the case is one of those in which it was intended to be exercised.

The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence, which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, extend to cases in which the "commitment" is for an offence which was an offence at common law, or under a statute which was passed prior to Confederation and is still in force. That, I think, is the effect of previous decisions by Judges of this Court. See *Re Sproule*, 12 Can. S.C.R. 140. The offence for which the applicant was committed to stand his trial is described in the warrant of commitment in these words:—

He, the said Charles Dean, at the city of New Westminster, in the county of Westminster, on the 15th day of September, A.D. 1911, did unlawfully break and enter the counting-house of the Bank of Montreal, situated on the corner of Columbia and Church streets, in the city of New Westminster aforesaid, and the sum of \$271,000, the property of the said Bank of Montreal then there being found therein did then and there steal contrary to the form of the statute in such case made and provided.

This language aptly describes an offence under sec. 15 of 7-8 Geo. IV. ch. 29, which became part of the law of British Columbia under the Ordinance of the 19th November, 1858, introducing the civil and criminal law of England into that colony. This enactment continued to be a part of the criminal law of British Columbia down to the time of the Union with Canada, and by sec. 11 of the Criminal Code it is now the law of the province in so far as it has not been repealed, "altered, varied, modified or affected" by competent legislative authority. The only change which has been made in the law as declared by sec. 15, relates to the nature of the punishment to which an offender is liable. Sec. 62 has consequently no application.

Application refused.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE WETMORE, C.J., NEWLANDS, JOHNSTONE, AND LAMONT, JJ.

THE KING v. SIDNEY.

1. HUSBAND AND WIFE (§ I A 2—19)—CRIMINAL LIABILITY OF HUSBAND FOR FAILURE TO PROVIDE "NECESSARIES" FOR WIFE AND CHILDREN — ESSENTIALS OF OFFENCE—CAN. CR. CODE 1906, SEC. 242.

It must be established, in order to convict a husband under sec. 242 of the Criminal Code, for failing to provide necessities for his wife or children, whereby their death resulted, that the articles or things which, without lawful excuse, he omitted to furnish were "necessaries" within the meaning of such section of the Code, and also that the death of his wife or children followed as a result of his omission to provide them.

[*The King v. Wilkes*, 11 Can. Cr. Cas. 226, and *The King v. Yuman*, 17 Can. Cr. Cas. 474, referred to.]

2. DEFINITIONS (§ I—11)—MEANING OF "NECESSARIES" AS USED IN CAN. CR. CODE 1906, SEC. 242.

"Necessaries" for failing to provide which for his wife or children, a husband is liable under sec. 242 of the Criminal Code, are such things as are essential to preserve life, since such word is not used in its ordinary legal sense, and what will constitute necessities must be determined in view of the circumstances of each particular case.

[*R. v. Brooks*, 5 Can. Cr. Cas. 372, approved.]

3. HUSBAND AND WIFE (§ I A 2—19)—LIABILITY OF HUSBAND—WIFE VOLUNTARILY LEAVING HOME—INSUFFICIENT CLOTHING—DEATH FROM FREEZING—CAN. CR. CODE 1906, SEC. 242.

A husband's failure to follow his wife and bring her back to his house, which she left in anger, on a bitterly cold night, and, being thinly clad, was frozen to death, does not render him criminally liable under sec. 242 of the Crim. Code, for failure to furnish her with "necessaries," where he provided a home according to his station in life and supplied his wife, who was in possession of all her faculties, with plenty of warm clothing, and, when she left his home, he had reason to believe that she had gone to a neighbour's but instead she got lost on the way.

4. INFANTS (§ I B—8)—CRIMINAL LIABILITY OF PARENT FOR FAILURE TO PROVIDE NECESSARIES FOR CHILDREN—CAN. CR. CODE 1906, SEC. 242.

A father is not criminally liable under sec. 242 of the Crim. Code for failing to provide necessities for a child ten years of age, who was taken by its mother, in anger, from the father's house on a bitterly cold night, and who was, with its mother, frozen to death, where the father, who had provided a home according to his station in life, had reason to believe that the mother and child had gone to a neighbour's, but, instead, they were lost on the way, since the father did not have reason to anticipate that the mother would expose the child to such danger.

[*Rea v. Wilkes*, 12 O.L.R. 264, 11 Can. Cr. Cas. 226, specially referred to.]

DECIDED: July 15, 1912.

CROWN case reserved on the conviction of defendant for criminal neglect of his wife and child, whereby their death resulted.

P. E. MacKenzie, for Crown.

T. D. Brown, for accused.

WETMORE, C.J.:—I agree with the conclusion reached by my brother Lamont. I may say it is possible that the accused may, in respect to the boy Samuel, have been guilty of manslaughter by reason of culpable negligence in the same way that a woman has been held liable for manslaughter for exposing a child of tender age and helpless where it is liable to be killed and is killed. That was by reason of a common law omission, however.

I am of opinion that under the circumstances of this case the accused was not guilty of the crime charged by reason of omission to supply necessities.

LAMONT, J.:—The accused was charged before my brother Brown, sitting with a jury at Saskatoon, on the following counts:—

(1) For that he the said James Sidney on or about the ninth day of January, in the year of our Lord one thousand nine hundred and twelve, near Biggar within the said judicial district of Saskatoon, being then and there as parent under a legal duty to provide necessities for Samuel Sidney, a child under the age of sixteen years, did unlawfully omit without lawful excuse to do so while such child remained a member of his household and the death of such child was caused by such omission contrary to section numbered 242 of the Criminal Code.

(2) For that he the said James Sidney on or about the day and near the place aforesaid being then and there under legal duty to provide the necessities for Florence Sidney, his wife, did omit without lawful excuse so to do and the death of his said wife was caused by such omission contrary to sub-section two-of section numbered 242 of the Criminal Code.

(3) For that he the said James Sidney on or about the day and near the place aforesaid did unlawfully, by omitting to provide necessities for the said Samuel Sidney and Florence Sidney, an act which it was then and there his duty to do, cause grievous bodily harm to the said Samuel Sidney and Florence Sidney contrary to section numbered 284 of the Criminal Code.

On this charge he was found guilty by the jury. After the verdict was given, the learned trial Judge, on application by counsel for the accused, reserved for the consideration of the Court *en banc* the following question; "Is there any evidence on which the jury could convict?"

The evidence shews that on January 9th, 1912, Florence Sidney, wife of the accused, and Samuel Sidney, his ten year old son, left the accused's home under the circumstances related below, and were frozen to death on the prairie. The "necessaries" which counsel for the Crown claims the accused unlawfully omitted to provide are that he, knowing of their departure from his house at a time when the temperature was thirty-seven degrees below zero, did not follow them and see that they did not suffer death or grievous bodily harm from exposure. The circumstances under which they left the house were as follows:—

The accused was working a farm near Biggar for a man named Hart. On the farm was a small house, or shack, in which resided the accused, his wife, and seven children, of which the eldest, Rose Sidney, was fifteen years old. At the time in question, and for two weeks prior thereto, there was also living with them one George Stock, a brother of the accused's wife. The house was small, and consisted of but two rooms, the kitchen, and one other room in which the accused and family slept. Owing to the limited accommodation in the house, Mrs. Sidney did not relish having her brother residing with her, although she said nothing to her brother about it. At that time she was in a pregnant condition, and at such times was given to fits of bad temper and crankiness and was difficult to get along with. On January 9th the accused and George Stock went to Biggar to get some supplies for the house. They returned home about 4.30 in the afternoon. The day was exceedingly cold, the temperature being 37 degrees below zero. On arriving home, cold and chilled, they went into the house to get warm. The accused said to his wife, "What have you got hot for us?" She said, "Who is 'us'?" The accused replied, "George and I." She said, "It is only you I have to think about, not George." Stock then went out to the sleigh and carried in his trunk, which they had brought with them from town. On seeing the trunk Mrs. Sidney said there was not room enough in the house for her things and the trunk, and if it was going to be in, she was going out for the night. She then opened the door and went outside for a moment. Coming in, she said to her son Samuel, about ten years old, "Come on, sonny, get on your things and we will go out for the night." She then put on her jacket, cap and mitts, and her shawl. She had nothing on her feet but house slippers and stockings, and was otherwise thinly clad. The boy put on his outside wraps and was warmly clad. As she was going out she made a remark in the hearing of her brother and her daughter Rose, to the effect that her husband would carry their corpses in. This, however, the accused did not hear. A few

minutes after they went out George Stock got up, saying he would not like to see them frozen to death, and asked the accused if he would go after them. The accused said no, they would be back in a minute or two. Stock, however, went out, and came back saying he could hear them talking by the pig-stye. The accused said if they were going that way they were going to Lefebvre's. Lefebvre was a neighbour living one and a half miles to the south. Supposing they had gone to Lefebvre's, nothing was done to ascertain where they were that night or the next day. The reason for this, the accused stated, was that he had learned from experience that when his wife became cranky the best thing to do was to leave her alone, as it only aggravated her the more to follow her and seek to persuade her to return. On January 11th, Stock started over to Lefebvre's to see if they were there, and he found their bodies frozen stiff on the prairie. From the tracks they made in the snow it was evident they had started for Lefebvre's and had got within 200 yards of the house when they took the wrong side of a bluff and could not find the house; they then took the trail back the way they had come, and had covered the greater portion of the road back when they evidently lost the trail and turned into the bluff where they were found. The evidence also shewed that on a former occasion Mrs. Sidney had threatened to take poison and the accused had to take it away from her, and about two weeks before January 9th, she had thrown herself in the snow and had to be carried in by the accused. According to his station in life, the accused provided well for his wife and family. Although his wife went out thinly clad, and with only house slippers on her feet, she had in the house three pairs of felt shoes, an abundance of warm, heavy underwear, a fur coat, and other clothing suitable for that climate. The family were well fed and housed, and there was no lack of what are ordinarily termed the necessaries of life. Under these circumstances, can it be said that the accused did unlawfully omit to provide either his wife or child with "necessaries" within the meaning of section

242 of the Code, under which counts (1) and (2) of the charge are laid. That section is as follows:—

242. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

(2) Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

In order to justify a conviction under this section it must be established (1) that the articles or things which the accused omitted to provide for his wife or child came within the term “necessaries” as used in the section; (2) that the accused omitted to provide them without lawful excuse; and (3) that the death of his wife and child were due to his failure to make such provision: *The King v. Wilkes*, 11 Can. Cr. Cas. 226; *The King v. Yuman*, 17 Can. Cr. Cas. 474.

As I have already said, the duty which the accused is charged with having neglected to perform is that he did not go after his wife and son when he saw them go into the cold and bring them back to the house before they died from exposure. Does this come within the term “necessaries” which under section 242 it is his duty to provide? “Necessaries” have been held to include food, clothing, shelter and medical attendance: *The King v. Lewis*, 7 Can. Cr. Cas. 261; *The King v. Wolfe*, 13 Can. Cr. Cas. 246, and in my opinion this list is not to be taken as exhaustive. In *The King v. Brooks*, 5 Can. Cr. Cas. 372, “necessaries” were held to mean such necessaries as tend “to preserve life” and not necessaries in the ordinary legal sense.

What is to be considered as necessaries must be determined by the circumstances of each particular case. I can readily conceive that if a father knew or should have known that his child of tender years was out on the prairie in danger of being frozen

to death, and he had the ability to succour it and omitted without lawful excuse so to do, he might properly be convicted under this section. To send aid to him under those circumstances might be just as necessary and just as much a parent's legal duty as to send for medical assistance in case of sickness. But under the circumstances of the present case can it be said that the accused, at any time before the death of his wife and son, knew or ought to have known that the assistance he is charged with not rendering was necessary? There is no evidence from which, in my opinion, such a conclusion could properly be drawn. So far as the count charging him with failure to provide necessities for his wife is concerned, no reasonable argument, it seems to me, can be advanced to support the contention of the prosecution. In *Reg. v. Smith*, 10 Cox 82, at p. 94, Erle, C.J., stated the law as follows:—

The law is undisputed that if a person, having the care and custody of another who is helpless, neglects to supply him with the necessities of life, and thereby causes or accelerates his death, it is a criminal offence; but the law is also clear that if a person having the exercise of free will chooses to stay in a service where bad food and lodging are provided and death is thereby caused, the master is not criminally liable.

The converse of this seems equally true, that where a woman having the exercise of free will chooses to leave the shelter provided for her by her husband and to go out into the cold and is frozen to death, the husband is not criminally liable.

Here the accused had provided sufficient shelter for his family, and there is no evidence from which it could be found that the woman was not in possession of her faculties and capable of exercising her free will. Her death, therefore, must be attributed to her own act in leaving the house rather than to the failure of the accused to provide her with necessary shelter.

Now, as to the son. The duty of the accused to his ten year old son is more far-reaching than to his wife. The boy had not reached the years of discretion, and could not be said to have the exercise of his free will. The accused, therefore, could

not expect from the boy that sound discretion and common sense he had a right to look for in the mother; and if the boy had, to the knowledge of his father, gone out alone at dusk to go a mile and a half to the neighbour's on such a night as January 9th, and the accused allowed him to do it, and as a result the boy was frozen to death, I would not be prepared, at least without further consideration, to say that the jury were wrong in finding him guilty, for in that case he would know, or he ought to know, that by going out on such a night the child would probably become lost and freeze to death. But where the child does not go out alone, but goes under the guidance of its mother, different considerations apply. In *Regina v. Bubb; Regina v. Hook*, 4 Cox 455, it was laid down that where a father provided sufficient food for his child, which was three years old, but the person in immediate charge of the child wilfully withheld the food from it, and as a result the child died, the father could not be convicted of manslaughter unless it was proved that he knew that the food was withheld, and knowing it, did not interfere. This principle, it seems to me, is applicable to all necessities referred to in section 242. Therefore, to justify the conviction of the accused for failure to provide necessities for his boy, it must appear that at some time before the boy's death he knew or ought to have known that the assistance he is charged with neglecting to provide was necessary in order to prevent the boy's life being endangered or his health permanently injured. He knew the boy had left the shelter of the house, but he did not know that he was in any danger. When he was informed that the boy and his mother had gone by the pig-stye, he assumed they were going to Lefebvre's. That he was justified in his assumption is proved by the fact that they did go to Lefebvre's, but by an unfortunate mistake they took the wrong side of a bluff and failed to find the house. Had they obtained the shelter they expected, and which the accused believed they would get at Lefebvre's, no liability could have attached to the accused: *Rex v. Wilkes*, 11 Can. Cr. Cas. 226, 12 O.L.R. 264.

There is no evidence to shew that the accused should have anticipated that his wife, who had been at Lefebvre's many times, would get lost on the way, or that she would deliberately expose the child to danger; and in the absence of anything which did lead or should have led him to the conclusion that the child was in danger he could have no knowledge that the assistance which, it is claimed, he should have rendered was necessary to the safety of the child. It therefore, could not come within the meaning of the term "necessaries" in sec. 242, because those "necessaries" are such things as an ordinary and reasonable man would know were necessary to be supplied.

The question submitted by my brother Brown should, therefore, be answered in the negative.

NEWLANDS, and JOHNSTONE, JJ., concurred.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., AND MEAGHER, RUSSELL, DRYSDALE, AND
RITCHIE, JJ.

THE KING v. GRAVES.

(Decision No. 2.)

1. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—MISDIRECTION IN
CRIMINAL CASE.

Leave to appeal will be granted the accused in a homicide trial involving the responsibility for the accidental discharge of a gun in the hands of the deceased if the appellate Court considers that the jury has not been properly instructed on the question of the causal connection between the acts of the accused and the discharge of the gun.

2. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—INSTRUCTING JURY ON MALICE—CRIMINAL CASE.

Leave to appeal will be granted the accused where the general effect of the instruction to the jury in a murder charge is, in the opinion of the appellate Court, to deal with the question of malice as if it were sufficiently proved by shewing ill-feeling on the part of the accused towards the deceased, where the circumstances were such as to make such definition prejudicial to the accused by reason of the meagreiness of any evidence of unlawful intent in respect of the crime charged as distinguished from mere ill-will.

[The conviction was subsequently affirmed on an equal division of the Court differently constituted: *Re v. Graves* (No. 3), 9 D.L.R. 175, 20 Can. Cr. Cas. 438; but on further appeal to the Supreme Court of Canada a new trial was ordered.]

3. APPEAL (§ XI—721)—LEAVE TO APPEAL—JURY INSTRUCTION ON PROVOCATION AND ITS MITIGATION—GRUDGE.

Leave to appeal should be granted the accused on a conviction for murder if the appellate Court thinks that the instruction given to the jury as to the possible mitigation of the offence by provocation was, in effect, limited so as to exclude acts done by the accused in carrying out a grudge.

4. HOMICIDE (§ III B—28)—SELF-DEFENCE—DANGER—PLACING IN FEAR OF VIOLENCE—COUNTER ATTACK.

Where the deceased took a gun to drive away several persons who had unlawfully congregated and were causing a disturbance in front of his house, and in handling the gun, took it by the barrel and used it as a club, its accidental discharge upon himself when so used, although resulting in his death, is not sufficient, where it does not appear that the deceased had been placed in any fear of violence from the accused, to charge the disturbers with murder, even if their acts prior thereto technically constituted an assault. (Dictum *per* Graham, E.J.)

5. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—CRIMINAL CASES—FAIRLY ARGUABLE GROUNDS.

The appellate Court on an application for leave to appeal in a criminal case should grant the leave if the questions raised are fairly arguable. (Dictum *per* Ritchie, J.)

6. HOMICIDE (§ II—17)—MURDER—MANSLAUGHTER—PROVOCATION.

If the defendants had no intention, when they assembled in front of the residence of the deceased, beyond that of annoying him and his family, against whom they had some ill-feeling, and if, being drunk, their passions were inflamed by the production by the deceased of a loaded gun, and the deceased used the gun as a club and was mortally wounded by its accidental discharge, and if the death was hastened by the subsequent battery of the deceased by defendants in sudden and uncontrollable passion on seeing the gun and hearing its discharge, which caused them to think they had been shot at and that one of them had been wounded by the shooting, although in fact he had only been hit with the stock of the gun, the crime of the defendants, if any, was manslaughter, and not murder. (Dictum *per* Russell, J.)

7. TRIAL (§ II A—40)—CRIMINAL CASE—INSTRUCTIONS TO JURY—SLIGHTING OF PRISONER'S DEFENCE IN SUMMING UP.

It is a serious flaw in a criminal case if the directions to the jury are not as carefully put in regard to the prisoner's case as is the case of the prosecution. (Dictum *per* Ritchie, J.)

[*Bex v. Walton*, 1 Cr. App. R. 227, approved.]

DECIDED: December 14, 1912.

THE defendants were indicted, tried and convicted for the murder of H. Kenneth Lea at Town Plot, in the county of Kings.

A preliminary motion on the question of venue made prior to the trial is reported, *R. v. Graves* (No. 1), 19 Can. Cr. Cas. 402, 5 D.L.R. 474.

Roscoe, K.C., for the prisoners, at the conclusion of the trial asked for a reserved case, and in order to give an opportunity to consider the questions to be reserved, further time was allowed to present them formally for the consideration of the Court.

SIR CHARLES TOWNSHEND, C.J.:—After considering the points submitted, the Court declined to grant a reserved case on the ground that none of the points submitted raised any question of law respecting which there could be any reasonable doubt, and most of them raised no question of law unless it were some objection to the general character of the charge in commenting on the facts in evidence to the jury.

From this decision the present appeal was taken.

Leave to appeal was granted, MEAGHER and DRYSDALE, JJ., dissenting.

W. E. Roscoe, K.C., in support of application:—Misstatement of the facts in the charge to the jury is ground for setting aside the verdict and granting a new trial: *Hawkins v. Snow*, 29 N.S.R. 444; *Taylor v. Ashton*, 11 M. & W. 401, 417; *Solarte v. Melville*, 7 B. & C. 435; *Smith v. Dart*, 14 Q.B.D. 105, 108; *Rex v. DeMarco*, 17 Can. Cr. Cas. 497; *Bridges v. Directors of*

The North London R. Co., 7 E. & I. App. 213, 234; *Commonwealth v. Poisson*, 157 Mass. 510; *Cunningham v. People*, 195 Ill. 550, 567. If the Judge's charge did not amount to misdirection, it was at least undue advocacy in favour of the Crown: *Hurdman v. Putman*, Cameron's Sup. Ct. 115; *Linn v. Commonwealth*, 96 Pa. 286. The facts were not put before the jury that were pertinent to the case of the accused: *Dupuis v. Chicago & N.W. R. Co.*, 115 Ill. 97; *Rex v. Nicholls*, 1 Cr. App. R. 167.

Inferences should not be drawn unless there is some substantial theory upon which to base them. They cannot be drawn from circumstantial evidence: *U.S. Fidelity Co. v. Des Moines Bank*, 145 Fed. Rep. 273, 279; *Ruppert v. Brooklyn Heights R. Co.*, 145 N.Y. 90; *Dunn v. State*, 106 Ind. 697; *Manning v. Insurance Co.*, 100 U.S. 693; *People v. Van Zile*, 143 N.Y. 368.

The jury should not be directed to return a verdict of murder or manslaughter according as they find the facts.

Mere trespass upon a person's property is not an excuse for the use of a deadly weapon: *R. v. Sullivan*, Carr. & Marsh. 209; *Wild's Case*, 1 Lewin 214; *Roberts v. State*, 55 Am. Dec. 97, 101; *State v. Morgan*, 38 Am. Dec. 714.

The burden is on the Crown of proving that the death of Lea was caused sooner than it otherwise would have been, had the kicking by the prisoners not taken place. This proof is wanting. Evidence of experts as to what may happen in the future should not be admitted as conclusive when it is merely speculative: *Briggs v. N. Y. Central and Hudson R. R. Co.*, 177 N.Y. 59; *Atkins v. Manhattan R. Co.*, 57 Hun 102; *Johnson v. Manhattan R. Co.*, 52 Hun 111; Wharton on Criminal Evidence (ed. 1912), 620.

The burden of proving the proximate cause of death is on the Crown: *Commonwealth v. Costley*, 118 Mass. 1; *R. v. Longbotham*, 3 Cox C.C. 439; *Miller v. State*, 37 Ind. 432-439; *R. v. Price*, 8 Cox C.C. 96; *R. v. McIntyre*, 2 Cox C.C. 379; *Epps v. State*, 102 Ind. 539; *Commonwealth v. Hackett*, 2 Allen 136,

141. Subsequent acts must be the efficient cause of death: *Johnson's Case*, 2 Lewin 164; *R. v. Martin*, 5 C. & P. 128; *Cunningham v. People*, 195 Ill. 550, 572; *R. v. Martin*, 11 Cox C.C. 136; *R. v. Pym*, 1 Cox C.C. 339. The Criminal Code, secs. 256, 258, was wrongly interpreted to the jury. As to the grounds upon which inferences may be drawn: *Hazel v. People's Pass. R. Co.*, 132 Pa. 96, 101; *Taylor v. Yonkers*, 105 N.Y. 202, 209; *Seales v. Manhattan R. Co.*, 101 N.Y. 661; *Leonard v. Miami Min. Co.*, 148 Fed. Rep. 827; *Whitehouse v. Bolster*, 95 Maine 458; *Montreal Rolling Mills v. Corcoran*, 26 Can. S.C.C. 595, 600; *Wakelin v. L. & S. W. R. Co.*, 12 App. Cas. 41 at p. 45.

It is not sufficient to say that it was the unlawful act of the accused which caused deceased to handle the gun in the way he did. There must have been something in the way of necessity or compulsion or well-grounded apprehension: *R. v. Donovan*, 4 Cox C.C. 399; *R. v. Pitts*, Carr. & Marsh. 284; *R. v. Hickman*, 5 C. & P. 151; *R. v. Evans*, 1 Russell on Crimes 666.

The direction as to Lea having died as the result of the original injuries was calculated to mislead. Nothing was left to the jury. If the prisoners did not go to Lea with the intention of doing him bodily injury likely to cause death, but with the intention merely to annoy him, that is not malice which would make the offence murder within the Code, secs. 259, 260.

The jury were misdirected as to "shock." The preponderance of the medical evidence was to the effect that the wound was one that would have been mortal in any case. The facts should have been put to the jury and it should have been left to them to draw a deduction.

The comment on the fact that formerly prisoners were not permitted to give evidence, was unfair to the prisoners. The reference to former convictions and character as affecting their evidence was unfair. The criterion of the value of a man's evidence is the probability of his speaking the truth, and this is not affected by a conviction for the non-support of his wife or for an assault committed while drunk.

The evidence shewed that the deceased had not the symptoms indicating shock. Evidence was improperly received as to the effect of kicking in producing shock.

The jury should have been asked whether the prisoners knew or were likely to have known the consequences of their acts. The law was not stated to them: Code, sec. 260.

There was no sufficient instruction in view of the intoxicated condition of the prisoners as shewn by the evidence. What the deceased did in striking with the gun is an element that should be considered in dealing with drunken men: *People v. Rogers*, 72 Am. Dec. 484; *R. v. Thomas*, 7 C. & P. 817, 820; *R. v. Savage*, 76 J.P. 32.

The charge introduced irrelevant matters, such as blackening the good name of the province, and was calculated to inflame the minds of the jury against the prisoners.

Misdirection and non-direction are one and the same in criminal cases: *R. v. Gibson*, 18 Q.B.D. 537; *R. v. Brooks*, 11 O.L.R. 525; *R. v. Farrell*, 20 O.L.R. 182, 187; *R. v. Blythe*, 15 Can. Cr. Cas. 224; *R. v. Theriault*, 2 Can. Cr. Cas. 444; *Prudential Ins. Co. v. Edmunds*, 2 A.C. 507; *Hawkins v. Snow*, 29 N.S.R. 444; *Bisbing v. Third National Bank*, 93 Pa. 79.

H. Wickwire, K.C., and *S. Jenks*, K.C., Deputy Attorney-General, *contra*:—The evidence shews ill-feeling and threats on the part of the prisoners towards deceased. There is evidence from which an inference can be drawn of an assault upon Lea before the discharge of the gun, such as the finding of a hole in the door, which was not there before, and a bottle inside.

There is no evidence that the prisoners were too drunk to know what they were doing. There is an inference that they were not telling the truth from their denial that they kicked Mrs. Lea, and their failure to make such denial when they were tried for the assault committed upon her. The effect of the evidence is to shew that Lea died from shock. No conviction will be set aside or a new trial ordered simply because some evidence has been improperly admitted or because something not accord-

ing to law was done on the trial, unless some material miscarriage of justice has resulted: (1907) L. R. Statutes 101, sec. 4; *Allen v. Rex*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331.

The rule for granting a new trial where there has been misdirection, although there may have been sufficient evidence to warrant the jury in convicting, is not the same as where evidence has been improperly admitted, thus usurping the functions of the jury.

Unfair summing up is not a sufficient ground for granting a new trial: *Hepworth's Case*, 4 Cr. App. R. 128; *Beeby's Case*, 6 Cr. App. R. 138; *Cohen's Case*, 2 Cr. App. R. 197.

The question is not whether the jury might, but whether they would have given a different verdict: *Donoghue's Case*, 3 Cr. App. R. 187; *Edward Hay's Case*, 2 Cr. App. R. 70; *Smith's Case*, 2 Cr. App. R. 214.

If issues in substance are put to the jury in the summing up the omission of the defence is no ground for a new trial: *Bradshaw's Case*, 4 Cr. App. R. 280.

The question is, Did the error influence the jury? *Stoddart's Case*, 2 Cr. App. R. 217, 245; *Norton's Case*, 5 Cr. App. R. 65, 76; *Atherton's Case*, 5 Cr. App. R. 233; *R. v. Swyryda*, 15 Can. Cr. Cas. 138; *R. v. Collins*, 12 Can. Cr. Cas. 402; *R. v. Lew*, 1 D.L.R. 99; *R. v. Higgins*, 36 N.B.R. 18; *R. v. Craig*, 7 U.C.C.P. 239; *R. v. Sylvester*, 1 D.L.R. 186, 45 N.S.R. 525, and on appeal in the Supreme Court of Canada (not yet reported); *R. v. Michaud*, 17 Can. Cr. Cas. 86; *R. v. Paul*, 18 Can. Cr. Cas. 219.

The accidental discharge of the gun was the result of the assault committed by the accused: *Fenton's Case*, 2 Lewin 179; *Curley's Case*, 2 Cr. App. R. 109.

As to causation, Wharton on Homicide, sec. 22; *Adams v. The People*, 50 Am. Reps. 617; Bishop's Criminal Law, vol. 2, 7th ed., sec. 658; Code, sec. 61; *Pockett v. Pool*, 11 Man. L.R. 275.

The defence was properly put as regards every matter in favour of the accused. As to the definition of murder: *Tasch-*

ereau's Crim. Code 207. Questions that could not be put to an expert witness a year ago may be permitted to-day through the advance in scientific knowledge. There is no such thing as legal relevancy in English law.

Evidence of rough treatment and abuse of deceased was properly received. There is no evidence that death was accelerated by removal to Halifax, that will not apply to the acceleration of the death by kicking. There is evidence that the death of deceased was accelerated by his treatment by accused subsequent to the gunshot wound.

Roscoe, K.C., in reply.

GRAHAM, E.J.:—The three defendants have been convicted of the murder at Town Plot, in King's County, of H. Kenneth Lea.

Misdirection mainly is complained of. There was a refusal to reserve or state a case and there is an appeal.

It is difficult to discuss the question of misdirection without referring to the provisions of the Criminal Code applicable to homicide, murder and manslaughter.

By sec. 252

Homicide is culpable when it consists in the killing of any person either by an unlawful act or by an omission without lawful excuse to perform or observe any legal duty, or by both combined; or by causing a person by threats or fear of violence (or by deception) to do an act which causes that person's death, or by wilfully threatening a child or sick person.

Sec. 259. Culpable homicide is murder

(a) If the offender means to cause the death of the person killed.

(b) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Sec. 260 has an application to this case, but exists in lieu of the old formula as to murder by killing without intent in the course of committing a felony, but now differing materially from that formula.

These two sections Crankshaw (page 279) has condensed as follows:—

The effect of the above sections is to divide murder into two classes. One class includes cases in which the offender means either to cause death or to cause bodily injury to his knowledge likely to result in death.

And the other class includes cases in which in order to facilitate the commission of any of the offences specified in sec. 260, the offender, whether meaning or not meaning to cause death, and whether knowing or not knowing that death is likely to ensue, inflicts (a) grievous bodily injury upon, (b) administers drugs to, or (c) stops by any means the breath of anyone and thereby causes death.

262. Culpable homicide not amounting to murder is manslaughter.

The deceased died within two days after the casualty from shock produced by a gunshot wound in the groin, plus, according to the theory of the Crown, bodily injuries alleged to have been committed by the defendants after the discharge of the gun and the shot wound had taken place.

I will refer to these more specifically afterwards.

Mrs. Lea says (I quote nearly all of her examination-in-chief):—

Q. Did you see these people? A. Yes, they were on the lawn.

Q. What were they doing? A. Dancing and singing.

Q. Were they within the lawn shewn on G/2? A. Yes, they were.

Q. What were they doing? A. Singing, dancing, swearing, and making a great noise.

Q. What did you do? A. After I saw one of them come near the house I went to fetch my husband.

Q. Which one was that? A. Harry.

Q. Did you find your husband? A. I found him in the lane behind the barn.

Q. What did he do? A. He came with me to the house.

Q. What did he do then? A. He stayed in the house for some minutes.

Q. During this time what was going on outside? A. Still the same noise.

Q. Then what did Mr. Lea do? A. He went out and asked them to go away.

Q. Did you see him go out? A. Yes.

Q. Did you hear what he said? A. Yes, I heard him ask them to go.

Q. What did they say? A. They said they were as good as he was and that they were not on his land.

Q. Where were they then, having regard to the photograph? A. They were at the point marked X on G/2.

Q. What did Mr. Lea do then? A. He came back into the house.

Q. Did you see the prisoners after he came back? A. Yes, they were pretty much in the same place.

Q. How long did Mr. Lea remain in the house? A. Five or ten minutes, perhaps.

Q. Then what did he do? A. He went out again and ordered them to go off.

Q. Did you see him go out? A. Yes.

Q. Did you hear what he said? A. Yes.

Q. Tell us as near as possible what he said? A. I think he said, "You fellows must be off."

Q. What did they do? A. They swore at him.

Q. Where were they then? A. They were nearer the house.

Q. What did Mr. Lea do then? A. He came back into the house.

Q. How long was he there? A. Some minutes.

Q. What did he do then? A. He took his gun and loaded it.

Q. What sort of a gun was it? A. A double-barreled one; one barrel for shot and one for ball.

Q. What did he put in it? A. He put in a cartridge.

Q. Did you see him? A. Yes.

Q. What did he do then? A. He went out again.

Q. Where did he go; through what door? A. Through the front door.

Q. The front door shewn on G/2? A. Yes, that is the door.

Q. Where from there did he go? A. To the head of the steps.

Q. You saw him? A. Yes.

Q. Did you see the prisoners then? A. Yes, I did.

Q. Where were you? A. By the dining-room door.

Q. That is the door on the east of G/2? A. Yes.

Q. Where were the prisoners then? A. They were about three yards from the steps.

Q. What did you see or hear then? A. I heard Mr. Lea say, "I will give you one more chance to go or I will fire."

Q. What did they say? A. Fred said, "Fire away, I am not afraid to die."

Q. Had they anything on the lawn? A. They had a bottle.

Q. What were they doing with it? A. They were drinking out of it.

Q. What occurred after you heard Fred say "Fire away"? A. I heard a rush of feet and loud talking.

Q. What is there at the bottom of these steps? A. There is a plank walk.

Q. Where did you hear the rush of feet? A. On the wood.

Q. Anything more? A. Then I heard the report of the gun.

Q. How many reports did you hear? A. Only the one.

Q. What did you do? A. I rushed out on the verandah through the dining-room door.

Q. Where was Mr. Lea? A. On his back on the verandah.

Q. Where were the Graves? A. They were all round him kicking him.

Q. What else occurred there? A. They tried to pull him up and let him fall back. Then they dragged him to the verandah railing.

Q. Look at G/1 and tell me which railing it was? A. That is the one at the point marked X.

Q. Who dragged him to the railing? A. I think all three.

Q. What did you do? A. I tried to defend him.

Q. What occurred? A. They tried to stop me.

Q. Who? A. I cannot say who; one or more of them.

Q. What did they do? A. They pulled me and kicked me and tried to pull me away; they tried to put him over the rail.

Q. Where was his head? A. It was outside the railing.

Q. What occurred after that? A. I don't know anything else until I saw him on the grass.

Q. Did you see Florence Wright and Edith Horne? A. I saw Florence. Edith was there; I can't say when.

Q. What was the next that you know of Mr. Lea? A. He was lying on the grass.

Q. Look at G/1 and tell us where he was? A. He was about where the plank is on G/1 south of the house.

Q. Where were the prisoners? A. They were all round him.

Q. What were they doing? A. They were still kicking him.

Q. What did you do? A. I knelt by my husband and tried to stop the bleeding.

Q. Did they do anything more? A. One of them kicked me and tried to pull me away.

Q. Were they saying anything on any of these occasions? A. They were still making a noise, a confused shouting and swearing.

Q. When you first went out did you hear Mr. Lea say anything? A. Yes, he said, "I clubbed the gun; I clubbed the gun."

Q. When you were on the ground, trying to staunch the blood, they kicked you again? (Objection to repeating evidence.)

The Court here adjourned until 2 p.m.

On resuming:—

Q. You had a maid at the house? A. Yes.

Q. What was her name? A. Florence Wright.

Q. Was she there at this time? A. Yes, she had just got back.

Q. Did you see her shortly after you went out on the verandah?

A. Yes.

Q. What did she do? A. She went to the neighbours for help.

Q. Did anyone come? A. Yes, Mr. Tobin and Mr. Starr.

Q. Who came first? A. Mr. William Tobin.

Q. What Mr. Starr came next? A. Mr. Richard Starr.

Q. Did anyone else arrive after that? A. Yes, old Mr. Tobin—Mr. John Tobin and Mr. Merritt.

Q. What became of Mr. Lea after they came? A. He was carried into the house.

Q. Through what door was he taken in? A. The front door.

Q. That is the door facing east? A. Yes.

Q. To what part of the house was he taken? A. To the parlour.

Q. Who carried him in? A. Richard Starr and Fred Graves.

Q. Did you see the prisoners in the house after Mr. Lea was taken in? A. Yes, I saw them all.

Q. Did anything occur there as far as they were concerned? A. They would not go out when they were asked to.

Q. From the time you came out the front door at first until Mr. Lea was removed from where he lay on the grass, did you hear the prisoners say anything? A. Yes, I heard Harry Graves say that he had had a lot against Mr. Lea for a long time, that he had got him now, and would have him straightened out before to-night.

Q. What doctor first arrived? A. Dr. Morse, from Port Williams.

Q. Do you know how he came? A. No.

Q. What became of the prisoners after they went out of the house? A. They were in the yard making a noise.

Q. What doing? A. Shouting and generally making a noise.

Q. Did Mr. Lea say anything about the occurrence shortly after he was taken into the house? About how this occurred?

(*Mr. Roscoe*, K.C., objects to evidence unless made in view of approaching death.)

Q. (By *Mr. Roscoe*) How long after the shooting or the report of the gun did this intended conversation take place? A. I cannot tell you how long it was after the report of the gun, but I can tell how long it was after he was taken into the house. I think it was between five and ten minutes after he was taken into the house. It was as soon as the men had gone out.

Q. What men? A. The Graves.

Mr. Roscoe, K.C.:—What the deceased said at the time the thing was going on is part of the thing itself and is admissible, but a narration after the thing occurred is not part of the *res gestae*.

Mr. Wickwire, K.C.:—I tender the evidence as part of the *res gestae*: *Gilbert v. The King*, 38 Can. S.C.R. 288.

THE COURT:—Do you press the question?

Mr. Wickwire, K.C.:—I do not consider it of sufficient importance to take any risk.

THE COURT:—My impression is that it is a continuous matter, and that being my impression, I will allow you to ask the question if you run the risk.

Mr. Wickwire:—I will not press it.

Q. Did you see them again? A. I saw Fred.

Q. Where? A. He tried to get in the front door.

Q. What did he do? A. He rang the bell. The door was locked.

Q. Were there other medical men there? A. Yes, Dr. Moore of Wolfville, and later Dr. Moore of Kentville.

Q. Did you see anything on the verandah? A. I saw two things. I saw the gun broken and I saw a bottle lying there.

Q. What sort of a door was on the dining-room? A. A wire screen.

Q. In what condition was it when you came out? A. It had a hole in it.

Q. Before that how was it? A. It was intact—there was no hole.

Q. What else did you notice then? A. Fred Graves was streaming with blood. I did not see Mr. Lea bleeding then.

Q. Did you see any blood subsequently? A. Later in the evening, yes.

Q. Looking at G/1, what is on the south side of the verandah? A. A flower bed.

Q. How is it kept up? A. There is a piece of wood holding the bed and stakes in that.

Q. On G/1 you indicated by an X where you saw Mr. Lea on the rail; directly under that was there a stake? A. Yes, there was one.

Q. Did you examine the board there and the stake?

(*Mr. Boscoe*, K.C., objects to leading.)

Q. I asked if you examined that board and stake? A. I did that evening.

Q. What was the result of your examination? A. There were blood stains on it.

Q. Who were in your house that night? A. Mr. and Mrs. Harry Brown, Richard Brown, and Dr. Moore of Wolfville.

Q. What was done the next morning? A. They took my husband to Halifax by the early train.

Q. Where to? A. To the infirmary.

Q. How long did he live? A. Twenty-four hours from the time we took him to Halifax.

Q. What have you to say of his previous physical condition? A. He was a man in excellent health.

Q. Previous to the time you have referred to, had you seen the prisoners the Sunday before? A. No.

Cross-examined:—Q. I said there was a discussion about their being on his property and you said no? A. I misunderstood you.

Q. There was such a discussion? A. Yes.

Q. Was that the first or the second time he went out? A. I think it was the first time.

Q. How long after that was it before Mr. Lea went out with his gun? After the discussion about their being on his land? A. It may have been twenty minutes or a quarter of an hour.

Q. Where were you then, when he went out with the gun? A. In the dining-room.

Q. Where was the gun kept? A. In the hall.

Q. Could you see the Graves when he went out with the gun? A. Yes.

Q. From where you were sitting in the dining-room? A. From where I stood in the dining-room.

Q. Did you remain where you were until you heard the report of the gun? A. Yes.

Q. How far was that, where you were standing, from the east verandah? A. I was close to the door leading to the east verandah.

Q. Were you looking out? A. Yes.

Q. The next you saw of Mr. Lea, after he went out with the gun, he was lying on the verandah? A. I saw him on the verandah with the gun.

Q. Where were you when you screamed? A. I was on the verandah.

Q. Did you call for any person? A. I called for Florence Wright.

Q. Harry said to Lea, You have killed Fred? A. Yes.

Edith Horne, who was in the house visiting the maid, as to the bottle and the hole in the door, says she went on the verandah when she heard the report of the gun.

Q. Which way did you go out? A. Through the front door.

Q. Did you notice the door? A. Yes.

Q. What about it? A. There was a hole in it.

Q. Was there anything there? A. There was a glass bottle.

Q. Where? A. Inside the dining-room door.

Q. Was it there before that? A. I don't think.

Q. What did you see after you got out? A. I saw Mrs. Lea and Fred Graves on the verandah.

Florence Wright, the maid, as to the bottle and the hole in the door, says:—

Q. What sort of a door goes on the verandah from the dining-room?

A. A wire screen door.

Q. In what condition was it before this? A. It was quite intact.

Q. Were there any holes in it? A. No.

Q. Did you notice it then? A. Yes.

Q. In what condition was it? A. There was a great hole in it.

Q. Did you see anything else? A. I saw a bottle inside the door.

Q. Having regard to the hole in the door, where was the bottle?

A. It was just inside.

Q. What condition were the men in? A. They were very drunk.

Q. All of them? A. Yes.

The hole in the screen door spoken of by the witnesses was caused, according to the theory of the Crown, by the throwing

of a bottle, out of which the defendants had been drinking cider in front of the house. It is not shewn at what time the hole was caused by the bottle, if it was caused in that way. It may have been after the discharge of the gun or before; that was all for the jury. In the summing up the incident is sometimes referred to as if the bottle had been thrown at Lea and sometimes as if it had been used to strike at him with. But there is no evidence other than the existence of the hole in the screen door and a bottle on the verandah to support the theory of an assault before the discharge of the gun, and there was no battery or it would be unlikely that the bottle caused the hole.

In the summing up none of these provisions of the Code which I have quoted, or their effect, were mentioned or explained to the jury. Some of the other provisions were read. Instead the old definition for the distinction between murder and manslaughter were used. Thus:—

The crime of murder is defined by our best legal authorities as the killing of a human being with malice aforethought express or implied. The crime of manslaughter is defined as the unlawful killing of another without malice aforethought either express or implied. You will observe that the distinguishing feature between the two crimes is the existence or non-existence of malice on the part of the accused towards his victim.

I will now call your attention to another rule of law which is of importance in connection with this case. It is that where one is killed by another in doing some unlawful act not amounting to felony or naturally tending to cause death or great bodily harm, without malice, or unintentionally, it is manslaughter.

The prisoners were unlawfully on Mr. Lea's property and were creating a disturbance there by their disorderly conduct, and that is in itself an offence in law. Although they could not have contemplated that the gun would be discharged as the result of their action, yet as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did. On the other hand, if a party while engaged in the commission of a felony kills another, it becomes murder and not manslaughter. What is meant by that is this: Suppose these men had come there at night for the purpose of committing burglary, and in the course of the commission of that act Mr. Lea had been killed, that would be murder because they then would have been there committing a felony. If a man breaks into your house at

night and you are killed in the defence of your house, whether by the discharge of a gun in your own hands or not, the burglars are responsible as for murder, because they are there at the time engaged in the commission of a felony. In the case of a mere trespass, as this might be, it would amount to manslaughter. Now, if one commits an assault upon another not likely to cause death, but death ensues, it is manslaughter. I hope that I am impressing the law upon you, because this case is a difficult one. It is difficult for the Judge to make clear to the jury these nice distinctions, and perhaps, for that reason, I had better repeat what I have said. If a man goes on the property of another as a mere trespasser and in the course of such trespass commits an assault or anything of that kind upon the owner of the property and death results, although he may have had no malice, if he is there unlawfully he is guilty of manslaughter. If, on the other hand, he went there with some wicked purpose, or with the intention of committing a felony, it would be murder. That is the distinction that the law draws between the two offences. The rule that will reduce the crime of killing another from murder to manslaughter is the absence of malice or ill-feeling towards the deceased. If there was no malice or ill-will the crime would be manslaughter. If the evidence satisfies you that the accused, although not intending to kill the deceased, in what they did, were actuated by malice and ill-will, and that his death resulted as a consequence of their unlawful conduct, it will be murder and not manslaughter.

I am not now urging an objection to the use of the old definitions in a summing up if it can be carried out successfully.

The common law is pretty much the same as the Code in this part.

But the formulas of the Code are just the formulas which have been used in England by the Judges, although they have no Code. The word "malice" had to be avoided because of its meaning. This is what happened here. The word "malice" was defined to the jury in its popular sense of ill-will, spite, or grudge; in fact, the words "malice or ill-will" is a common expression throughout, while the citations of or references to the common law of course contained that word in its legal sense in connection with homicide.

I quote from the instruction in the summing up:—

The jury here retired, but later requested directions on the subject of malice. Having returned:—

THE COURT:—I thought I had defined that fully. "Malice" is

where a man has ill-will towards another—any kind of wicked feeling towards his neighbour. If you come to the conclusion that what these men did resulted from hatred or dislike, or ill-will, that would make it murder. If there is evidence to satisfy you that these men were influenced by spite or ill-will, that with the other facts would constitute murder. But you must not find them guilty of murder unless you are satisfied from the evidence that they had a grudge, or spite or ill-will against Mr. Lea.

A Juryman asked for further directions as to premeditated murder and malice.

THE COURT:—Premeditated murder would be an agreement to commit murder before they went there. There is not the slightest evidence of that. But if the grudge was there and they went there without any premeditated intention, if their acts were induced through ill-feeling, that would constitute murder. If you are satisfied that what they did was not done through ill-will, that would be manslaughter.

A Juryman:—Then we do not need premeditation; all we need is malice?

THE COURT:—All you need is malice.

A Juryman asked for further instructions as to the distinction between murder and manslaughter.

THE COURT:—It is enough if they did the acts with malicious intent. If in carrying out the acts that they did after they got there there was malice, that would be malice sufficient to constitute murder. There is no evidence of premeditation here. I think that when they went there they had no intention of doing anything of the kind, but it arose from what occurred afterwards.

The jury then retired.

Roscoe, K.C.:—I think your Lordship should say to the jury that if the final acts causing the death of Mr. Lea, so far as defendants were concerned, were committed in the heat of provocation by acts of Mr. Lea, the killing of Mr. Lea would not be murder.

THE COURT:—I explained to them about provocation. However, I will recall them.

The jury having been recalled:—

THE COURT:—After you were here, Mr. Roscoe called my attention to something that he would like me to say to you in reference to provocation. I think I went fully into that question, as to when provocation would reduce the crime from murder to manslaughter. However, Mr. Roscoe wants me to draw your attention to the fact that if you think that at the time when they assaulted Mr. Lea there was such provocation on the part of Mr. Lea to them as took away their judgment, then it would reduce the crime from murder to manslaughter. That is correct. But if after they got there they were carrying out a grudge, if they had it, it constitutes murder.

A Juryman:—If they had malice it is as bad as if they had premeditation?

THE COURT:—Yes.

A *Juryman*:—Would they have to have that malice at the time he was shot?

THE COURT:—Yes, they would have to have the malice at the time. If they had these malicious feelings or this antipathy towards the deceased, it must have existed at the time they did what caused his death, even though they had no intention of doing it before they went there. You must gather the existence or non-existence of malice from what they did at the time. You must take into consideration the threats made beforehand, although I do not know what value you will put on them, to show bad feeling towards Mr. Lea.

A *Juryman*:—Is it necessary to prove that just before the crime was committed—a few minutes before—they had malice?

THE COURT:—What I have told you is that if there was malice you can gather it from the facts of the whole transaction. If you think from the facts proved that they had this ill-feeling during the time that they were doing the injuries, then it is malice.

The jury then retired.

The meaning of “malice aforethought” in its legal sense may be learned from the report of the eminent commissioners who prepared the Draft Code of England, from which the Canadian Criminal Code is copied, viz., Lord Blackburn, and Barry, Lush, and Fitzjames Stephen, JJ.

Page 23:—“The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows: Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—

“(a) An intent preceding the act to kill or to do serious bodily injury to the person killed, or to any other person.

“(b) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not.

“(c) An intent to commit any felony.

“(d) An intent to resist an officer of justice in the execution of his duty.”

At page 15 of their report they said: “We have avoided the use of the word ‘malice’ throughout the Draft Code, because there is a considerable difference between its popular and its

legal meaning. For example, the expression 'malice aforethought' in reference to murder has received judicial interpretation which makes its use positively misleading."

In this case the use of the word "malice" not only led to what I think is confusion, but in the circumstances here was prejudicial to the prisoners, as I shall presently shew.

Then the word "felony" is a dangerous word to use as it was used unless it is explained to a jury, and in this case its introduction was unnecessary because the acts were not committed in the course of committing a felony, and sec. 260 of the Code, which specifies those crimes in lieu of felony did not apply at all to the case.

But to associate it thus:—

If, on the other hand, he went there with some wicked purpose or with the intention of committing a felony, it would be murder,

is very misleading to the lay mind.

I shall deal with the subject of the gunshot wound first.

It was caused by the deceased striking one of the defendants, Fred Graves, a severe blow on the head with a gun which the deceased had clubbed and which was loaded and cocked, the concussion causing the gun to be discharged into his own body. The gun was broken in two pieces by the blow. Mrs. Lea says: "Fred Graves was streaming with blood."

In the ordinary way of speaking one would say that the gunshot wound was caused by the discharge of a gun produced, controlled and discharged by the deceased, a free agent, rather than by the defendants, one of them supplying only the head against which the concussion was produced; that the voluntary act of the deceased supervened upon a condition, not a cause.

But it is contended in effect that the defendants caused the deceased to strike Fred Graves on the head with the gun, or at least caused the discharge of the gun.

The only provision of the Code at all applicable to such a case is the last part of sec. 252, already quoted, namely, causing a person by threats or fear of violence to do an act which caused that person's death. That provision covers an indirect killing.

In respect to this branch of the case, the learned Chief Justice who tried the cause said, in part, to the jury. The passage follows the last extract which I have quoted:—

I will next draw your attention to the law bearing upon one of the most important features of the case. There is a common idea, or I have heard it said, that because Mr. Lea held in his own hand the gun the discharge of which inflicted the wound which proximately contributed to his death, the accused are not responsible for that part of the affray. I have heard that—and probably you have—that they did not shoot him. It would be a sorry business if that were the law. It would be absurd if such were the law. They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun as much as if they seized the gun and discharged it into him. Did they rush at him with the intention of assaulting him, and did Mr. Lea then use the gun? If so they are as responsible as if they seized the gun and discharged it into him.

“A person may be responsible for the death of another either as murder or manslaughter, provided it was caused by his unlawful act resulting in corporal injury.”

The unlawful act there, as I have pointed out, would be the men assembling in a disorderly way and trespassing on Mr. Lea's property and refusing to go away when asked. They would not be responsible unless their unlawful act contributed to his death, but the unlawful act need not be the sole cause of his death. It is not necessary that the shooting alone should be the cause of his death, but if it resulted in his death the prisoners are responsible for either murder or manslaughter according as you find the circumstances. In a legal work of great authority it is laid down as follows:—

“If the direct cause of his death is an act of the deceased himself, reasonably due to the accused's unlawful conduct, as in the case where a person by actual assault or threat of violence causes another to do an act resulting in death, then the accused is responsible.”

Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way of conveying to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the deceased which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hands and using the stock to defend himself against their assault, they are responsible for the consequences. That that is the law is clear as day. There are two or three cases in the English reports which will illustrate the point, and I have taken the precaution to get every authority which I thought would illustrate the point or help you to reach a conclusion. In one of these cases the deceased was assaulted and forced to jump into a river, whereby he was drowned. There the accused was held respon-

sible for his death. Although the accused did not force the deceased into the river, yet his unlawful act caused him to jump into the river, and so he was drowned. Here the unlawful act of these parties in assaulting Mr. Lea, if you find that they did so, caused him to use the gun in the way he did, and the gun going off caused his death.

I will read you another case from the English reports, and you must remember to the English authorities we look. In this case the deceased was riding on horseback when he was assaulted by the accused. The deceased put spurs to his horse in order to escape, which caused the horse to wince, and he threw the deceased and killed him. The prisoner in that case was held responsible for the death of the deceased.

In another case threats of violence against his wife caused her to get out of a window in order to escape, when she fell to the ground and was killed. In that case the accused was held responsible for the death of his wife. He did not make her get out of the window or cause her to fall, but he did an unlawful act which resulted in her jumping out of the window and being killed.

Now I should think with these illustrations and what I have said on this part of the case you should be clear in your own minds as to what the law is.

And in dealing with another matter he said: "What I mean is that although one of them only may have struck a blow, or caused the gun to go off, they are one and all responsible, etc."

The three cases mentioned in the summing up are: *R. v. Pitts*, Carr & Marsh. 284 (jumping into the river); *R. v. Evans*, 1 Russell Cr. Law 666 (jumping out of the window), and *R. v. Hickman*, 5 C. & P. 151 (thrown from a horse on fleeing, having been assaulted and struck with a stick). They have found a place in the provision of the Code just mentioned and are all founded upon the condition of a deceased being put in a state of fear by the violence of the defendant, namely, that the deceased, in doing the act which caused his death, was moved by a well-grounded apprehension of immediate violence. Under such circumstances the theory is that the act of the deceased cannot be regarded as voluntary, but is merely the exercise of a choice between two evils, and so is directly dependent upon the act creating the condition which required the election. Although a defendant's act was not the immediate cause of the homicide, and the act of the deceased was, yet the later inter-

vening cause is neutralized because the preceding act took away the power of volition from the deceased.

In respect to the two quotations in this passage from vol. 21 Cyclopaedia of Law and Procedure 694, 697, in the first one the writer of the article is not, as the context shews, dealing with the cause of a cause at all, but any direct cause.

In the second quotation the writer is dealing with the subject which is provided for in the provision of the Code just mentioned, and for it he cites in the note a note of the three English cases to which I have already referred and some American cases. But all of these, as far as I can gather, like the English cases, proceed on the ground of fear, causing in the one instance a person to jump from a railway train, or directly causing the person's death by forcing him to take a course directly tending to his death. With us the law is all in this provision of the Code. I prefer it and I think it is fairly easy to construe. There must, I should think, be a well-grounded fear and apprehension of immediate danger. The cases insisted on that. The expressions "causing" and "cause" mean, I think, "directly causing" or "cause," not remotely "causing" or "cause." I refer to *Reg. v. Tower*, 12 Cox C.C. 530; *Reg. v. Bennett*, 1 Bell C.C. 1.

I notice that the word "forcing" is used in respect to this class of cases in more than one text-book; also the word "compelling."

I think also that this provision as to causing a person through fear of violence was a necessary addition to sec. 252 and is not already included in the earlier part of the section.

In this summing up the question of a state of fear from violence was not put before the jury at all. The evidence, indeed, does not shew that kind of a case. It was put forward as law that if it was some unlawful act, as an assault on the part of a defendant which resulted in the deceased's act causing the gun to be discharged into his body, then the defendant would be responsible: that the intervening voluntary act of the deceased

was not to be taken as the direct cause of his death. but the earlier act was the cause. Take this extract, for example:—

Here the unlawful act of these parties in assaulting Mr. Lea, if you find that they did so, caused him to use the gun in the way he did and the gun going off caused his death.

I think with deference that without the element of fear called for by the provision of the Code, there is no sufficient causal connection.

If the attempt of the learned counsel for the Crown to establish an assault from the bottle and door matter was due to the desire to make the case fit the passage in 21 Cyc. 698, namely:—

If the direct cause is an act of the deceased himself reasonably due to defendants' unlawful conduct as in the case where a person by actual assault or threat of violence causes another to do an act resulting in death.

I think the law fails as well as the facts.

The provision of the Code does not contain that expression either "unlawful conduct" or "actual assault." There must be produced a "fear of violence." Of course it may be produced by an assault. But unlawful conduct or assault without that is not there.

We are not to have two laws on this subject, I suppose, the provision of the Code and the passage in the Cyclopedic. An actual assault, apart from fear of violence, may be good American law, but it is neither the English common law nor the Code law.

The learned counsel for the Crown sought to uphold this view, namely, that irrespective of the question of fear and of the provision quoted, there was in this case a chain of causation from the defendants' illegal act. For this he urged and seemed to require the fact of an assault. I suppose on the strength of the bottle and the door incident down to the shot wound. I do not agree. Whether it is to be regarded as caused by the final act voluntary on the part of the deceased or as an accidental discharge of the gun, any chain of causation was severed by that final act of the deceased.

In *Rex v. Waters*, 6 C. & P. 328, a charge of manslaughter, the first witness for the prosecution swore that the deceased's boat being alongside the schooner, the prisoner pushed it with his foot and the deceased stretched out over the bow of the boat to lay hold of a barge to prevent the boat from drifting away, and, losing his balance, fell over and was drowned. On that day the prisoner and the deceased had some dispute about paying for spirits, and, both being intoxicated, a good deal of rough joking had taken place between them.

Park, J., after consulting with Mr. Justice Patterson, said that his learned brother and himself were

of opinion that if the case had rested on the evidence of the first witness it would not have amounted to a case of manslaughter.

Campbell, C.J., in *People v. Rockwell*, 39 Mich. 503, where there had been a conviction of manslaughter, said:—

The death occurred during a dispute concerning the possession of a horse. Rockwell was shewn to have struck Wilber with his fist and knocked him down. It was not shewn directly how he was killed, but it appeared distinctly this blow did not kill him. The facts indicated either that Rockwell kicked him after he fell or else that he was killed by the horse trampling on him.

The jury came in and asked the Court to instruct them

whether the respondent would be guilty if he knocked Wilber down and the horse jumped on him (Wilber) or kicked him and thus killed him.

The Judge reiterated what he had already instructed them, namely:—

That if the blow was not justifiable and Wilber so fell that the horse jumped and struck Wilber and killed him with his feet or kicked him, respondent was guilty.

The Court reviewing the conviction said:—

It is impossible to maintain such a charge without making everyone liable, not only for natural and probable consequences, but for all possible consequences and circumstances which immediately follow a wrongful act. There was no necessary connection between the act of respondent and the conduct of the horse, which he cannot be said from the record to have been responsible for.

And the prosecution was carried no further by direction of the Court. I also refer to *Reg. v. Ledger*, 2 F. & F. 857; *Kelly's Case*, 2 Lewin 193; *Thompson's Case*, 2 Lewin 194; and to Wharton on Homicide, 3rd ed., p. 30:—

As a general principle we may hold that to create criminal responsibility for homicide, the death must have resulted from the malicious or negligent conduct of the defendant through the ordinary agency of physical laws, and must not have been caused by the interposition of an independent human will, not acting in concert with the defendant, or by extraordinary casualties.

I think that the contention of the learned counsel for the Crown carries responsibility for an illegal act too far. The boys in that part of the country who visit orchards by night for apples run great risks. The proprietor may produce a gun to frighten them away, and if it becomes discharged the discharge may kill them, but if with a boomerang or petard effect he is killed, and there has been any ill-will, howsoever old, they are apparently liable to be hanged for murder.

I do not believe that is in accordance with the law.

Surely, too, the jury should be asked whether the defendants, when they did the act, whatever it was, contemplated as reasonable and responsible men that death or grievous bodily harm was likely to result to the deceased.

And the learned Chief Justice himself had said in another part of his summing up:—

Although they could not have contemplated that the gun would be discharged as the result of their action, yet as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did.

(Of course the implication was that if there was malice then it was murder.)

There was no battery shewn or to be inferred before the shooting took place. The inference from the bottle and the hole in the screen door amounted to nothing unless that hole was shewn to have been produced before instead of after the discharge of the gun, when the other injuries were effected.

And there is nothing but a technical assault at most. And in the jury's mind the trespass to the land, the noise and profanity, owing to the summing up, would be considered as illegal acts.

This brings me to the law on the question of intent on this branch of the case.

Sec. 260, as I said, does not apply. Further, it cannot be successfully contended, I think, that they "meant to cause the death of the deceased." I think that was conceded.

The Crown is driven to this provision:—

Culpable homicide is murder . . .

(b) If the offender means to cause the person killed any bodily injury which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Now, even supposing there was a chain of causes and that the defendants were to be held responsible for a constructive killing, I think that in a case like this, when this shooting is the reverse of what would ordinarily result, and no doubt a great surprise to both parties, and the alleged assault if any was so remote, and a similar casualty so seldom happens, it is difficult to see in what way the defendants are brought within that provision as to intent. Their minds could not have gone along with an action which was so completely beyond their wills and was so unintended.

As to the effect of the misdirection upon the verdict, it is very clear that the jury by their questions evinced concern about one point only, namely, "malice or ill-feeling."

They seemed, in consequence of the summing up, to have taken it for granted that the defendants were responsible in law for the shooting.

I think they were also misled by not having placed before them the matter necessary to deal with the question of intent as defined in the provision (b) just quoted, instead of having their attention turned only to malice, an unfortunate word, used so many times and never occurring in these provisions.

With great deference, I think that the use of the word malice

in the summing up was prejudicial. It may be more favourable to the prisoners in some cases to define it as ill-will or spite or grudge than to use the Code definition of intent, but I think in this case it was not. The jury asked for instructions as to malice.

Now in the legal sense of malice there was, in my opinion, on this branch of the case nothing worth submitting to a jury.

But in the popular sense of the word the Crown would have more of a case.

It had happened that one of the Graves had married a servant of Mrs. Lea's, and the maid had left her for the Graves without notice and both the deceased and she had warned their maids against the Graves, which fact, of course, had reached the Graves' ears.

Then there were two separate witnesses who detailed something which one of the Graves had said eight or nine months before the casualty and another something that another Graves had said seven or eight months before, each remark evincing a dislike of the deceased, and these things were no doubt conspicuously before the minds of the jury. And the jury thus had the way made easy. First, that in law the defendants were responsible for a killing. Then all the jury had to do was to add to that the ill-feeling above indicated and there would be a crime of murder.

The second branch of this case is founded upon the provision as to the acceleration of death, namely, section 256:—

Everyone who by any act or omission causes the death of another, kills that person, although the effect of the bodily injury caused to such person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

And the evidence tends to shew a battery committed by the defendants or some of them after the discharge of the gun into the body of the deceased took place.

It consisted of kicking and, as it is alleged, putting him over the verandah railing, when he fell to the ground, and pressing their knees into him on the ground. No weapon was used. The

doctor found four or five bruises and an injury probably from falling on the stake of the flower-bed. The defendants deny putting the deceased over the railing and say that he fell over. Mrs. Lea said that she knew of her husband being wounded about two minutes after she got to him on the verandah; also that she went on the verandah when she heard the discharge of the gun, p. 37.

It was on the verandah he told Mrs. Lea "I clubbed the gun" and afterwards, on the lawn, that he was bleeding to death.

Apparently the defendants or one of them, Fred, closed in towards the deceased when he produced the gun. The Crown contends that they all rushed towards him when he produced the gun and defendants contend that there was no closing in until the gun was discharged. In any case they would not likely know, that the other barrel was not loaded.

As I have said Fred received a serious blow on the head and it was bleeding and they claim the blow knocked him down. At any rate the defendants claim that at first they thought it was Fred who was shot and that the deceased was knocked down by the recoil of the gun. Whether this is so or not the fact that they at first claimed that Lea had shot him was a circumstance that lends some probability to their version, because if false its falsity would appear then and there. But whether they thought he was shot or only had his head injured by the stock of the gun it was bleeding profusely and it seems to have attracted more attention at first than the wound of the unfortunate deceased. Mrs. Lea bound it up on the lawn and then or later told him to go to a doctor. At any rate, as I said, they closed in on the deceased and kicked his body and they did it apparently on account of the injury Fred had received.

Expert opinions of doctors were given tending to shew in effect that death was accelerated.

Then if the terms of the Code had been used, 259 (b), the question would have been whether this bodily injury, succeeding the shooting, was known to the defendants to be likely to cause death and were they reckless whether death ensued or not.

Did they know of his condition when even his wife apparently did not know of it until afterwards on the lawn when he told her he was bleeding to death, although in fact he was not? And did they know, or should they contemplate what the expert doctors now say in their opinions that their acts would tend to increase shock and so on?

Assuming, as I have contended, that there was not responsibility for the gunshot wound, or whether there was or not, this part of the case required very careful submission to the jury. The question of the acceleration, that is the apportionment of what was due to the gunshot wound and what if any to the subsequent battery, the opinions of the doctors being largely speculative, and so on, were matters to be carefully weighed by the jury.

The following is a statement which conveys a decided opinion on the facts to the jury, and the last sentence might be taken for a direction in law:—

It is known that shock, even in operations, will cause death, and there can be no doubt that all the doctors testified that Mr. Lea died as the result of the shock to his system resulting from what transpired at his home on that Sunday afternoon. Now, as I understand it, but for this brutal treatment, there was a fair chance of his recovery from the gunshot wound, but it is of little consequence whether he would or not. The unfortunate man died and it was the result of the conduct of the accused.

These injuries, the gunshot wound and the battery, should have been separated in case there was no responsibility for the former.

The use of the word malice in connection with this branch of the case, and I have already mentioned it in connection with the other, was, I think, prejudicial to the prisoners. I have already quoted one passage at the outset, namely:—

If the evidence satisfies you that the accused—although not intending to kill the deceased—in what they did were actuated by malice and ill-will in what they did, and that his death resulted as a consequence of their unlawful conduct, it will be murder and not manslaughter.

There are three other passages:—

Now as I said before, you must judge their motives from their conduct, whether they were actuated by malice, spite and ill-will in this

inhuman treatment of Mr. Lea. Does the evidence satisfy you that in acting and behaving there as they did they were gratifying an old grudge that they bore towards Mr. Lea? If you find that they were actuated by malice and ill-will in going there and behaving as they did, even though they did not intend to injure him, the crime is murder, but it depends entirely upon what you as honest men under the evidence believe as to the facts, whether you should find the prisoners guilty of murder or the lesser crime of manslaughter. Was it revengeful feelings that led them to maul him as they did after he had received the gunshot wound? If so, they are guilty of murder.

Now, just a few words in conclusion. I have explained to you as fully as I could the difference between murder and manslaughter. I have told you that if you believe these men were actuated by ill-will or malice towards Mr. Lea, and did what has been detailed here, that would be murder. and that all of them should be found guilty. On the other hand, if you think that there was no such ill-feeling, that it was a mere fracas, without previous ill-feeling, then your verdict should be manslaughter. I have called your attention to the various witnesses who have come here and testified to different expressions of ill-will towards Mr. Lea, and you have heard the expressions that they used on this occasion. You must weigh these. If you believe them it is evidence of malice and it is for you to consider them.

If you think that the expressions which the prisoners are proved to have used from time to time were mere talk and nothing else—that they did not amount to anything real, and that there was no real malice or ill-will, in that case your verdict should be manslaughter. I have explained the circumstances under which you should act in either case, and I need not go over them again. I leave the matter in your hands without another word.

I think that this case is too serious a one to leave it to a jury to find for murder or manslaughter according as they find whether there was or was not malice in the sense of ill-feeling. That is the direction to them. I cannot see that the jury applied their minds to anything else, and there were very important questions to determine outside of that.

Moreover, I think that this case should not have been submitted to the jury as if there was no alternative but one of either murder or manslaughter. I have dealt with the gunshot wound. If there was no acceleration there was an alternative of acquittal. Because in the summing up this appears:—

Before further commenting on the facts I will draw your attention to the law on the subject of murder and manslaughter, because your verdict should be one or the other according as you find the facts.

I think it would be difficult for the jury to deal with the question of "the heat of passion caused by sudden provocation" without a reference in the summing up from first to last, to this blow on the head which the deceased gave to Fred. Indeed it might have called for mention in connection with the cause of the gun being discharged.

But at any rate, the learned Chief Justice in the summing up, dealing with the subject of provocation, after quoting the provision of the Code, sec. 261, says:—

These are the circumstances under which you may find the crime to be manslaughter and not murder; that is, assuming always that malice and ill-will are not present. Now these clauses require some explanation and comment. Manslaughter differs from murder in this, that though the act which occasions death is unlawful or likely to be attended with bodily mischief, yet if there was no malice, express or implied, it amounts to manslaughter only. When, therefore, death ensues from sudden transport of passion or heat of blood, if there is a reasonable provocation by the deceased and no malice, it will be manslaughter only. Where, however, the provocation is sought by the prisoner, it is no answer to the charge of murder.

It will be for you to say whether these men had any provocation to do these acts on the part of Lea. If they had it would be manslaughter and not murder. Now what were the acts, or what did Lea do to put them into a transport of passion so that they had no control over themselves. That is for you. I should be sorry if in any way I mis-stated the law to you, because it would be lamentable if this trial should be made abortive through any misdirection of mine. I have therefore presented to you the authorities that are binding upon us shewing what is murder and what manslaughter. You see, therefore, that if there was any provocation on the part of Lea, the crime can be reduced. But the provocation must be something that a man feels and resents on the instant. If he had time to cool or there is evidence of malice, it would be murder. I take that from a legal work. Applying these rules of law to the facts of this case, where was the provocation on the part of Lea that caused the accused to act as they did? That is for you. If you think that the crime can be reduced from murder to manslaughter, you will ask yourselves what did Lea do to cause these men to do what they did? What provocation did he offer to them? They were unlawfully on his premises, behaving in a provoking manner; the deceased had twice requested them to depart and they not only refused to do so, but continued their conduct. Lea then got his gun, thinking to frighten them. They jeered at him and it is for you to infer whether one of them did or did not attempt to strike

him with a bottle, when Lea raised the gun and injured himself. Who then was the provoker of the assault? Did Lea do anything to palliate their conduct? Remember that he was acting in defence of his home and his wife and children against these men, who, without right or justification, were assailing him in it, just as if you were defending your home from a gang of rowdies who surrounded it.

As to the facts, I suggest that before any battery on the part of the defendants, there was the production of the gun and cocking it (and putting it to his shoulder, if it was put to his shoulder) and the striking Fred Graves on the head with it, even assuming that preliminary to this there was a closing up by the defendants and the bottle and the door incident (call it an assault) had occurred. There then was a case of provocation to be submitted to a jury.

I think the jury would be required to pass on this also to say whether the use of the gun and the blow struck with it, even in defence of his house (if it was used for that, or merely to drive them away because they were annoying him and his household) was or was not excessive.

In *Regina v. Brennan*, 27 O.R. 659, there was evidence that just before the killing the prisoner had called at the house of the deceased to see the latter, who ordered him out and immediately laid hands on him and put him out of the house, when the prisoner drew a revolver and shot the deceased. The Judge at the trial directed the jury that deceased

“when he ordered him out and then took hold of him to put him out, was doing that which he had a legal right to do,” and that therefore there was no provocation.

Held misdirection, for whether or not the deceased

at the time he was shot was doing what he had a legal right to do depended upon whether if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting the deceased had before laying hands upon him ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points.

As to the defendants seeking the provocation, I think the proviso refers to a case of a defendant inciting a deceased into an act of provocation just for the purpose of providing the defendant with an excuse for killing or hurting him, a merely colourable provocation, and it does not apply to a case of a defendant who because he struck the first blow or is wrong in the quarrel is to be barred of the reduction of the offence.

There is apparently some confusion in this part of the summing up owing to the unfortunate use of the word malice throughout all of the summing up and I do not know that I follow it. It would appear as if the learned Chief Justice laid down the law, malice is essential to murder; if that is not present the homicide is but manslaughter; provocation will reduce murder to manslaughter, but only when there is no malice. If he meant that, provocation would play rather a useless role in all such cases. But I think (he says "I take that from a legal work") that the writer meant that in dealing with facts the provocation which was manifested on a given occasion and the passion evinced, would not probably be depended on to reduce the homicide to manslaughter if there was evidence of the existence of "malice" previous to the incident, i.e., malice in the sense of a premeditated design to kill the person. The killing would be due to the design rather than to the passion or seeming passion produced by an act of provocation.

But the learned Chief Justice also said:—

There is no evidence of any premeditation here. I think that when they went there they had no intention of doing anything of the kind (i.e., the acts they did after they got there), but it arose from what occurred afterwards.

Also:—

There is nothing in the evidence to indicate that these men—perhaps I am stating it too favourably to them—went to the residence of Mr. Lea with the formed intention of killing him, or even of doing him bodily harm. I may safely say that, except for the evidence which I will point out to you, shewing that they bore him malice or ill-will.

That shews it was a case where passion from provocation was a most important element for consideration. And handi-

capping it with a proviso "provided there is no malice" was not giving effect to the provision of the Code. The jury would be misled to a wrong conclusion because when was there ever a battery or an affray without ill-will being present?

I think *Stedman's Case*, 1 East's P.C. 234, is helpful:—

The prisoner who was a soldier, was indicted for the murder of one Macdonel, a woman. It appeared that a friend of the deceased, being fighting with another in Covent Garden, and the prisoner running towards them, the woman said to him, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" Upon which the woman gave him a box on the ear, and then Stedman struck her with the pommel of his sword on her breast. Thereupon she fled and he pursued and stabbed her in the back with the sword. It seemed to Holt, C.J., that this was murder, the box on the ear by the woman not being a sufficient provocation for the killing her in that manner, and after he had given her the blow in return for the box on the ear. And it was agreed to have this found specially by the opinion of all the Judges there. But it afterwards appearing in the progress of the trial that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be only manslaughter. The smart of the wound, says Mr. Justice Foster, and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.

This case is used as an illustration in Stephen's Digest of Criminal Law, p. 187.

Then in connection with this subject of provocation I think several witnesses for the Crown speak of the defendants being drunk. The defendants themselves, on cross-examination, deny it. It only shews that being "drunk" is a relative term. But if there was any degree of intoxication it ought to be mentioned to the jury in that connection because a person in liquor may more readily give way to passion on receiving provocation: *Rex v. Thomas*, 7 C. & P. 817.

Of course the summing up must be looked at as a whole. It is fallacious to pick out a small passage and look at it apart from its context. And it is also fallacious in dealing with one passage to pick out another one not germane to the matter and not curative at all in its effect and argue that this other passage is correct or this other matter was submitted to the jury. At this

argument we had perhaps a little of this. I append to this opinion the whole summing up, that it may be referred to as a whole.

A point was raised as to the regularity of the hypothetical questions which were submitted to some of the doctors, inasmuch as they did not contain precise statements of fact that could afterwards, there being a dispute, be put to the jury, but contained such vague terms as (1) "and afterwards kicked and abused"; (2) "kicking and brutal treatment"; (3) "rough handled and pounded about"; (4) "kicked and pulled about," when there was a dispute in the evidence as to the pulling of the deceased over the verandah and dragging on the lawn, which these vague terms might cover and might not cover. I think they were irregular.

In my opinion there was within the meaning of the 1019th section of the Code a substantial wrong or miscarriage occasioned on the trial by the misdirection and matters which I have dealt with. There were other questions raised at the hearing which in my opinion were very arguable, and the prisoners should have a full opportunity of being heard upon them, if they may have to appeal.

In my opinion the leave to appeal applied for should be granted and a case should be stated which will enable the prisoners to raise the questions involved in their application to the learned Chief Justice upon the ground therein mentioned, that is to say from ground 4 to 36 inclusive but omitting 35, which is hardly a question of law. There are many repetitions but it is not easy to recast them into a few points covering the whole matter complained of.

RUSSELL, J.:—The three defendants, who are brothers, met near the residence of the late Mr. Lea, at Port Williams, on Sunday afternoon, the 23rd of June. It is not proved that they met by appointment,—at least it is not so proved beyond a reasonable doubt, although it was put to the jury somewhat emphatically that they had come from different quarters by appointment for the execution of some common purpose. There

is no evidence as to the purpose, if any, for which they came to the premises of the deceased except such as is afforded by their conduct when they were there. They all had been drinking and their conduct was such as greatly to annoy and exasperate the deceased and his family. Mrs. Lea says that they were upon the lawn in front of the house, while the evidence for the defendants is that they were upon the roadway. There can be little if any doubt that the statement of Mrs. Lea is correct. The deceased requested them to leave, but they remained and continued their annoying conduct. He retired into the house, or, as the trial Judge informs us, to the barn, "to avoid them in the hope that the men would depart when no notice was taken of their outrageous conduct." From his retirement in the house or barn, as the case may be, he soon after returned to the verandah, and this time he ordered the defendants to leave. They did not go away and the deceased again retired into the house, from which he shortly afterwards reappeared upon the verandah with a loaded gun into which he had inserted a cartridge while in the house. We have no means of knowing whether he aimed the gun at the prisoners or not, but it seems probable that the gun was cocked. The learned Judge assumes that it was the purpose of the deceased merely to frighten the defendants. If this had been his object there was no necessity for his loading the gun and it is extremely probable that if the gun had not been loaded the unfortunate victim of the tragedy would still be living. It is in proof that he threatened to shoot, when one of the defendants in effect challenged him to do so, saying that he was ready to die. Immediately after this there occurred what the learned Judge describes as a "dash at the house" of which the defendants' counsel, however, contends there is no evidence, but which would be the most natural thing in the world to happen if the two defendants who were not so "ready to die" as their brother, assumed that the latter was about to be shot by the deceased. There is positively no evidence whatever of any assault at this stage of the proceeding nor any evidence whatever to warrant a finding

that the defendants had any intention beyond that of disarming the deceased. Of course there was no evidence of that intention either. All that we know about the matter is that one of the defendants received a blow on the head which inflicted a serious wound and that the deceased was shot in the groin by the accidental discharge of the gun which he was using as a club with the muzzle in his hands. The wound was one which, in the opinion of the doctors, or one or more of them, would not necessarily have resulted fatally; but the prisoners, according to the evidence of the witnesses for the Crown, at once proceeded to kick the deceased in a brutal manner, to throw him over the railing of the verandah and drag him some feet or yards along the ground to a place where they continued or renewed their brutal and inhuman treatment. After some neighbours who had been sent for arrived upon the scene, the deceased was carried into the house with the assistance of the prisoners or one or more of them and his wounds were attended to by Drs. Morse and Moore. The next morning he was taken for treatment to Halifax and placed in the Infirmary, where he died of shock resulting from his injuries or his removal or both on Tuesday morning.

The prisoners have been found guilty of murder and if there has been no error in the trial, I imagine there will not be many persons found to shed tears over their fate. But it is more than possible that they were not guilty of murder at all. It is altogether possible, and I should judge it highly probable, that the deceased inflicted a mortal wound upon himself by his manner of using the gun which resulted in its accidental discharge. It is also possible, though it will perhaps be considered improbable, that the fatality resulting from the wound was not accelerated by the conduct of the defendants any more than it was by the removal of the patient to Halifax,—a removal which of course was nevertheless entirely justified by the circumstances of the case.

If the defendants had no intention when they went to the residence of the deceased, or when they stopped at his place on

their way to the river for a swim, beyond that of annoying the deceased and his family, against whom they certainly had ill-feelings, arising out of circumstances which need not be enlarged upon at this point, if, being in a state of intoxication their angry passions were inflamed by the production of a loaded gun, if apprehending an assault by the defendants who according to the construction put upon the evidence by the learned Judge, made a rush towards or upon the verandah, the deceased made use of the loaded gun as a club, and was fatally wounded by its accidental discharge, if the subsequent conduct of the defendants, however brutal and inhuman, and however justly it aroused the indignation of the learned Judge, did not cause the unfortunate victim to die any sooner than he would have died from the gun shot wound and the long and tedious railway journey to Halifax, or even if their conduct accelerated the fatal issue, but was caused by the sudden and uncontrollable gust of passion aroused in them by the discharge of the gun which seems to have led the prisoners to suppose that they had been shot at and to have the impression upon the mind of one of them that his brother had been wounded, then the crime of the prisoners, if my reading of the law can be relied on, was not murder, but manslaughter at the most.

If these considerations had been placed before the jury and they had been invited to weigh them fairly and dispassionately, and if, after giving them deliberate consideration, they had come to the conclusion that the defendants were guilty of murder as charged in the indictment, although I do not myself understand how these hypotheses could have been rejected by the jury without more than a merely reasonable doubt, I should nevertheless, in all probability, have felt that it was impossible to disturb their verdict. But I have read the charge of the learned Chief Justice without being able to discover that the hypotheses I have suggested in favour of the defendants or any of the obvious possibilities that might be urged as reducing the crime from murder to manslaughter were ever presented for their consideration. The jury might very well have understood from the language of

the learned Judge that if the defendants, without any intention whatever of killing the deceased, had made an assault upon him and the deceased in using his loaded gun as a club had been killed by the accidental discharge of it in his own hands, the accused would be guilty of murder. He says as much as this in the following words:—

Did they rush at him with the intention of assaulting him and did Mr. Lea then use the gun? If so they were as responsible as if they had seized the gun and discharged it into him.

If they had seized the gun and discharged it into him they would undoubtedly have been guilty of murder and I cannot find that the learned Judge has anywhere in connection with this branch of the case instructed the jury in such a way as to make it clear to them that they could not find the prisoners guilty of murder simply because of the accidental wounding of the deceased by the discharge of the gun, without reference to any subsequent ill-treatment of their victim. He did, it is true, indicate to them that there was a distinction between murder and manslaughter, but it is not clear from the charge by what criteria he instructed them to make the distinction in the present case. In one part of the charge it seems to be made to depend upon the question whether the act of the defendants which led to the result was a felony or a misdemeanour, although the latter word is not explicitly used. But the distinction between these two things was not explained to them; they were not informed that the distinction had been abolished by the Criminal Code, nor was any explanation given them as to the manner of applying this distinction under the changed conditions brought about by our amendment of the common law. In another paragraph his Lordship seems to make the question depend upon the existence or non-existence of malice, but there is no clear explanation to them of what was to be understood in this connection by this exceedingly slippery expression which has been purposely omitted from the definition of murder in the Criminal Code because of the difficulty of explaining it to a jury and the moral certainty of its being misunderstood, as it

almost certainly was by the jury in this very case. If the jury may have gathered from the expressions of the learned Chief Justice that it was open to them to find the defendants guilty of murder because of the gunshot wound received from the gun in his own hands, I have little doubt that this was an error which vitiates the result of the trial.

I also think the defendants were entitled to have the benefit of an instruction as to the possible mitigation of their offence in their treatment of the deceased after he fell upon the verandah wounded by the discharge of the gun. They were intoxicated, beyond doubt, and of course the fact of their intoxication does not furnish an excuse for their crime. But there is good authority for the proposition that a smaller degree of provocation in the case of a drunken man than in the case of a sober man, will produce that state of sudden and uncontrollable passion the existence of which will reduce to manslaughter the crime that would otherwise be murder. No considerations of this kind were ever put before the jury. On the contrary, when the jury were recalled for the purpose of having their minds directed to this aspect of the enquiry, they were instructed in the following terms:—

Mr. Roscoe wants me to draw your attention to the fact that if you think that at the time when they assaulted Mr. Lea there was such provocation on the part of Mr. Lea to them as took away their judgment, then it would reduce the crime from murder to manslaughter. That is correct. But if after they got there they were carrying out a grudge, if they had it, it constitutes murder.

I think the jury must have been led to understand from these expressions that no matter what was the effect of any provocation received from Mr. Lea, no matter if these defendants, without any premeditation of murder on their part, were thrown into such transports of rage by the presentment of a loaded gun and the belief that one of their number had been shot, that they lost all control of their passions for the moment, their crime could not be reduced from murder to manslaughter if they had a grudge against Mr. Lea when they assembled on his lawn as they undoubtedly had. This view of the law is so

clearly erroneous that if there were no other reasons for complaining of the charge the ends of justice would require that the prisoners should have another trial.

While I have thus dealt with what seems to me to be the cardinal objections to the charge of the learned trial Judge, I ought to add that having carefully read the opinion of Mr. Justice Graham I agree with everything therein contained except the conclusion. I do not think that there should be or need be any further argument of the matter. The counsel for the Crown and the prisoners have been fully heard on every possible point in the case and both consent and desire that judgment should be given on the points argued as if a case had been reserved by the trial Judge, and there is a good precedent for this course. Why there should be any suggestion under these circumstances to depart from this common sense disposition of the cause is beyond my comprehension.

RITCHIE, J.:—This is an application for leave to appeal from the learned Chief Justice's refusal to reserve a case upon certain questions submitted to him by Mr. Roscoe, K.C., on behalf of the defendants. The defendants were convicted of murder.

Question 28 is as follows:—

Whether the law applicable to the case was stated sufficiently to enable the jury to determine whether if the defendants were guilty of homicide such homicide was murder and the facts applicable to such law pointed out.

Section 259 of the Code provides as follows:—

Culpable homicide is murder:

- (a) If the offender means to cause the death of the person killed.
- (b) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not.

Section 255 is as follows:—

Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an unlawful act, or by an omission without lawful excuse to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person. Culpable homicide is either murder or manslaughter.

I think that in this case in order to state the law sufficiently it was necessary to charge the jury not in respect to malice, ill-will or spite, but in regard to the matters set out in sub-sections (a) and (b) of section 259. Did the defendants mean to cause the death of Mr. Lea? Did the defendants mean to cause Mr. Lea bodily injury knowing it to be likely to cause death and were they reckless as to whether death ensued or not?

These questions were not put to the jury. Of course in investigating the thing which makes the crime murder, namely, the intention to kill and the intention to cause bodily injury knowing it to be likely to cause death and being reckless as to whether death ensued or not, malice, spite, ill-will, etc., are most important factors for the jury in arriving at the intention. The learned Chief Justice was charging under the Code. He put to the jury the different sections dealing with homicide except that he did not put to them or in any way refer to section 259, which defines the crime of murder and lays down what constitutes the crime. Therefore I think the law was not sufficiently stated.

Question 12 is as follows:—

Whether the law read and stated to the jury in the case of the man forced to jump into the river, or the man thrown by his horse or the woman getting out of the window, and stated to be applicable were, so applicable and the direction in that behalf correct.

The three cases referred to I take to be *Regina v. Pitts*, Carr. & Marsh. 284; *Rex v. Hickman*, 5 C. & P. 151; *R. v. Evans*, 1 Russell on Crimes 666.

The rule laid down in *Regina v. Pitts* was that in order to make the prisoner liable there must have been on the part of the deceased apprehension of immediate violence well founded from the circumstances by which the deceased was surrounded, and that the jumping into the river was a step which a reasonable man might take under the circumstances.

The principle of *Rex v. Hickman*, 5 C. & P. 151, is that the prisoner was liable because the deceased from a well-grounded apprehension of a further attack upon him which would have

endangered his life spurred on his horse. I think this case is distinguishable from the case at bar. Where a man on horse-back is assaulted, if he does not want to fight, the very obvious, reasonable, natural thing to do is to give his horse the whip or the spur. Therefore if the horse excited by the spur throws the rider and kills him the assault is in law the proximate cause of death. I think it cannot be said that it is a reasonable or natural thing for a man to point the barrel of a gun which he knows to be cocked and loaded at his own body and strike at another with the stock.

The rule laid down in *R. v. Evans*, 1 Russell on Crimes 666, was that if the woman was constrained to jump from the window by her husband's threats of further violence and had a well-grounded apprehension of his doing such further violence as would endanger her life the accused was responsible.

Whether these cases are applicable or of any assistance depends upon two things:—

(a) Was what Mr. Lea did a reasonable step for a man to take under the circumstances?

(b) Was fear of violence the cause of Mr. Lea handling the gun as he did?

Fear on the part of Lea, caused by the derendants, is the thing which would make the defendants responsible and the question of fear was not put before the jury at all. They were given the facts and that the accused were held responsible but not the grounds or principles upon which that responsibility rested, and this I think was dangerous and likely to mislead. If the principle of these cases had been given to the jury their minds would at once have been brought to the vital questions, was Mr. Lea's action with the loaded cocked gun reasonable? Did he think his life was in danger or was he in fear of violence if he did not do as he did? A jury might answer these questions in the negative and in that event the cases would be clearly distinguishable and have no application whatever.

Question 9:—

Whether the direction that the defendants were responsible if they rushed at Lea with the intention of assaulting him, and Lea then used

the gun, as much as if they had seized the gun and discharged it into him is correct.

The learned Chief Justice, in another part of the charge, puts the same view before the jury in the following words:—

If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hand and using the stock to defend himself against their assault, they are responsible for the consequences. That that is the law is as clear as day.

I understand this to be the law, provided that what Mr. Lea did was done under a well-founded apprehension of immediate serious violence.

Apart from this under the cases which the learned Chief Justice referred to at the trial I do not understand it to be the law. The qualifications I have mentioned and which are mentioned in the cases were not put to the jury and therefore I think there was error in the direction.

Question 3:—

Whether the facts pertinent to the defendants' case were put before the jury in the trial Judge's charge.

Assuming that the treatment by the defendants after the gun went off was the cause of or accelerated death the case is one of murder or manslaughter. In my opinion the case of the defendants as to provocation reducing murder to manslaughter was not put to the jury in the way that they were entitled to have it put. There is very strong evidence that the defendants were under the bona fide belief that one of their number had been shot. They saw him bleeding. As a matter of fact he had been struck on the head with the stock of the gun and Mr. Lea had threatened to shoot if they did not go away and they had heard the gun go off. I think these facts were very pertinent to be put before the jury. They were not put, but, on the contrary the trend of the learned Chief Justice's remarks rather pointed towards there being no evidence of provocation.

I agree with the remark made by Mr. Justice Walton in *Rex v. Warner*, 1 Crim. App. R. 227, which was as follows:—

I think it is a serious flaw in a summing up if it does not put the case for the prisoner as carefully as the case for the prosecution.

I am of opinion that a case should be stated in respect to the questions which I have dealt with.

I think these questions are all arguable and when questions are fairly arguable I understand that it is proper to have them stated for the opinion of the Court.

I also agree that the questions referred to by my brother Graham at the conclusion of his opinion are questions which should be stated.

DRYSDALE, J. (dissenting):—This is a motion for leave to appeal from a refusal of the learned Chief Justice to reserve questions of law that arose on or in connection with the trial of the three defendants on a charge of murder. As I understand our procedure it is only a question of law that can be considered on this motion, and that question must be one arising either on the trial or on the proceedings preliminary, subsequent or incidental thereto or arising out of the direction of the trial Judge. If such Judge refuses to reserve for the Court of Appeal any such question then this Court is empowered to hear the appeal from such refusal and if leave to appeal is granted in respect to any such question of law a case shall be stated for the opinion of the Court of Appeal as if the trial Judge had at first reserved such question.

The alleged questions of law herein that were submitted to the learned trial Judge after the trial, with a request for a reserved case are 36 in number, some of these containing a number of sub-paragraphs. All of these the trial Judge refused to reserve on the ground that none of them raise any question of law respecting which there can be any reasonable doubt, and that most of them raise no questions of law unless it be some objection to the general character of his charge in commenting on the facts.

The question, then, I take it, and the only question before us is as to the correctness of the learned trial Judge's refusal to reserve any of the 36 points so submitted. Was the refusal right as to all of them? If not, in respect to which one or more

was he wrong? Should we decide his refusal was wrong in respect to any of these points submitted to him for reservation, then the case can be stated as to such points and the points or questions of law so stated, and such points only, can be considered.

There was a disposition on the part of counsel on both sides in the case to dispose of it in its present shape on the footing of a case stated, and an Ontario authority was cited for such a course of procedure. Such a method of dealing with a case that only involved, say, one serious question I can understand—even then I doubt the jurisdiction—but to attempt a disposition of this case where 36 different and specific questions are brought forward for reservation, all of which have received the considered refusal of the learned Chief Justice, and many of which, on their face, are not in my opinion questions of law at all within the meaning of “questions reserved” in the Code, would, I think, only lead to confusion in subsequent proceedings if any there be. For myself I must decline to consider any disposition of the motion before us except in regular order, and this leads me to a consideration of the learned trial Judge’s refusal to reserve any of the questions submitted on the ground that none of them was proper for reservation. In this connection I may say that in criminal trials, if a serious point of law is mooted or urged on behalf of a prisoner, and raised *bona fide*, I think the correct practice for the trial Judge to adopt is to reserve such a question, even although he has a strong opinion against the contention, provided in his judgment it raises an arguable question.

Applying this rule, which I myself have invariably tried to follow, to the case in hand, I would be disposed to have a case stated in respect to question 28 and hear argument thereon, simply on the ground that it may fairly, perhaps, be said to be arguable. This question, to my mind, raises the only one of any moment and really covers the lengthy argument made before us in so far as such argument was pertinent to a ques-

tion of law raised before the learned Chief Justice, the only thing properly before us.

This means the question of misdirection, and if misdirection there was, was there in the opinion of the Court of Appeal some substantial wrong or miscarriage thereby occasioned on the trial.

As intimated, I would be disposed to have a case stated on this one point and such point regularly brought before us. We sit here as a Court of Appeal with statutory powers only and a regular procedure is laid down which, if followed, permits of the proper disposition of any question of law raised on behalf of a prisoner. Disputed questions of fact and the proper inferences to be drawn from proved circumstances are not before us, except in so far as we examine the facts in proof to ascertain whether or not there was misdirection in law.

I emphasize this regularity in procedure because of the apparent disposition of counsel in argument to treat the facts in dispute as wide open and as if this were an application for a new trial on any and every ground that could be suggested. In this proceeding before us disputed questions of fact and every inference that could properly be drawn from proved circumstances are forever closed by the finding of the jury against the prisoners unless there was misdirection in law. As the merits on the only question of law that I would have properly here, viz., the question as to misdirection, are being considered, I feel bound to examine the charge and consider the same.

The charge was one of murder against the three prisoners. It seems the prisoners, one Sunday afternoon in June, invaded the home of a peaceable citizen in Port Williams, one Mr. Lea. They were in a state of intoxication, more or less, and in a most offensive manner entered upon Mr. Lea's private grounds surrounding his house, and were guilty, without a doubt, of the most offensive conduct towards Mr. Lea and his household that could by any possibility be imagined. After being requested and ordered to leave the premises, their insulting and insolent conduct became worse, if possible, and so outrageous were their

proceedings that Lea finally brought out a loaded gun, no doubt with a view to intimidate them. By this time Lea was on his verandah, with his wife, children and maids inside. The prisoners were each carrying bottles from which they were drinking. The case for the Crown is that when Lea was on his verandah with his gun the three prisoners determined to assault and beat him and with bottles, that the three of them rushed on his verandah and attacked him; that on this unlawful and unprovoked assault he clubbed his gun rather than fire and attempted to defend himself; that in so doing the gun which he was using as a club was discharged into his body; that thereupon the prisoners continued to beat, kick and abuse Lea in his injured condition, dragged and pulled him over the rail and off the verandah on to the lawn, and for some time continued to beat, kick and ill-use him in his wounded condition. Lea died from shock within 40 hours. The Crown charges murder on two broad grounds. First, that in the assault on Lea, with intent to do him serious injury they are responsible for his death even if the direct cause of death was an act of the deceased himself, because it was reasonably due to the prisoners' unlawful conduct. And, secondly, because if not responsible for the discharge of the gun their conduct in the brutal treatment of Lea, wilfully administered by prisoners after the gun's discharge, accelerated or hastened death.

These two broad propositions were for the jury, and if the facts and circumstances in proof were such, under proper directions as to support either of these contentions on the part of the Crown, the verdict of guilty would be warranted.

These main features of the Crown's case were supported by a very respectable body of evidence and the only controversy over questions of fact arose from the prisoners taking the witness-stand in their own behalf and in some particulars controverting statements relied upon by the Crown.

In the light of this I turn to the charge and examine it and ask myself where if at all the learned Chief Justice was guilty of error in law. I may first remark in pursuing this enquiry

that it is obviously necessary to read and re-read the charge as a whole in order to ascertain how he guided the jury on the principles of law applicable to the facts in hand. It is and would be manifestly unfair to pick out isolated passages taken from a charge and read and consider them apart from the context. The test, I take it, is, can the charge, when taken in its entirety, be considered on the whole as sound and not calculated to mislead on any matter of substance. It was argued here that the learned Chief Justice expressed his own views strongly as to men and matters. The answer to this is, he had a right to, provided always he let the jury clearly understand that their views on questions of fact were to prevail, not his. The importance of reading this charge as a whole, and not isolated passages, is so apparent that I annex the whole charge hereto. The leading attack on the charge is that the trial Judge did not properly instruct the jury, inasmuch as he did not read to them the Code definition of murder.

The first thing I would say about such a contention is that, in my view, it would be a very poor way for any Judge to attempt to explain the law to a jury by reading the Code. In practice it is not usually done and for the very sound reason that except to the mind of a trained lawyer the reading of the Code would only create confusion and almost certainly in the mind of an ordinary juryman. On this point the learned Chief Justice took, I think, the wiser course of propounding in popular and easily understood language the principles of the common law as handed down to us by expressions unmistakable of eminent English Judges and of assuming that the Code is declaratory only of such principles. I am not aware that the English decisions applicable to such a state of facts as we have here are not authoritative and binding and I am clearly of opinion that our Code does not alter the law in this respect. Under this head of attack it was said the trial Judge referred to the English decisions based on the distinction between felony and misdemeanour, a distinction abolished by our Code. Even so, this was only by way of illustration and a fair reading of

the whole charge, I think, will at once dispel any question of doubt that might arise by a reference to such cases. In the final result the learned Chief Justice was clear and unmistakable on what should guide them in the matter of considering the death of Lea if attributable directly to the gunshot wound; and when he took from a standard work of authority the statement I will quote as the law for their guidance I am of opinion he was on absolutely sound ground. It will be observed that the learned trial Judge, on this branch of the case, gave them a certain and definite direction in the following words:—

It is not necessary that the shooting alone should be the cause of his death, but if it resulted in his death the prisoners are responsible for either murder or manslaughter according as you find the circumstances. In a legal work of great authority it is laid down as follows: "If the direct cause of his death is an act of the deceased himself, due to the accused's unlawful conduct, as in the case where a person by actual assault or threat of violence, causes another to do an act resulting in death, then the accused is responsible."

This was, I think, on this branch of the case, the guiding principle inculcated by the Chief Justice and apparent on his whole charge. His illustrations were apt and the English cases he referred to in detail simply emphasized this rule. I think this statement is a correct exposition of the law as administered in England and I accept it without hesitation or qualification as the law in Canada. The acts of the deceased in directly causing his death must, in order to make the accused responsible, be reasonably due to the accused's unlawful conduct. Whether it is so reasonably due or not is a question of fact for the jury. If the act of Lea in discharging the gun into himself was reasonably due to the unlawful acts of the prisoners in brutally assaulting him then they are responsible. This was wholly for the jury and I have no intention of usurping the functions of the jury in this respect or of expressing myself in favour of or against such a finding.

The charge plainly shews that the question whether or not there was a serious assault on Lea by the prisoners was properly left wholly open for the jury's consideration. They may very

properly have taken the view that the evidence established such circumstances as wholly warranted the finding of a deliberate and brutal assault. The inference would be very obvious that one could fairly ask a jury to draw from undoubted facts. Mrs. Lea heard a rush on the verandah; then the gun report; she goes out at once; the three prisoners are on the verandah in the attack on Lea and continue it not only on Lea but on herself; a bottle has been driven through the screen door and one on the verandah floor; Lea was down, his glasses broken, even the gold or metal rims. If Mrs. Lea's statement were accepted by the jury then the only question for the jury to consider to bring the prisoners within the rule quoted was whether the clubbing of the gun, obviously in self-defence, was a reasonable thing to do under the circumstances, and was it reasonably due to their unlawful attack. They could very properly say it was, and more than that I do not feel called upon to say.

If the jury so found acting on this instruction and were properly instructed as to the governing rules that distinguish murder from manslaughter then I would unhesitatingly say that on this branch of the case there was no misdirection and that the verdict was warranted.

On the other branch of the case, viz., that even if the prisoners were not responsible for the discharge of the gun still they caused or hastened his death by brutally assaulting and mauling him in his wounded condition, the evidence for the Crown was that death was due to shock and the allegation was that there was a fair chance of recovery from the wound had it not been for the mauling and beating subsequently. The charge in this respect seems unobjectionable and under the evidence it was quite open to the jury to take the view that death was hastened if not directly caused by the subsequent unlawful proceedings on the part of the prisoners. That Lea was kicked and beaten on the verandah subsequent to the wound is obvious. That he was dragged and pulled around the verandah in his wounded state and ultimately thrown or pulled over the rail

and fell on a stake receiving serious injury, is reasonably clear. And that he was then dragged along the grass and further brutally treated is supported by a body of evidence that the jury could do nothing but properly accept. If this conduct accelerated the death of Lea the prisoners are liable. In this connection the learned trial Judge quoted to the jury section 256 of the Code and properly stated, I think, that it covered this branch of the case, and when he further added the instruction to the effect

that although the prisoners may not have been responsible for the infliction of the gunshot wound, if they hastened his death by their rough treatment and ill-usage of him subsequently, they are responsible for murder or manslaughter, according as you find that malice was or was not present,

I think he made his meaning clear beyond a question and in my view stated a sound proposition of law whether considered either from the standpoint of the common law or the Code.

Under these circumstances it seems to me that it was quite open to the jury to find that the prisoners were responsible criminally for the death of Lea on either branch of the Crown's case.

Then it is obvious the question would arise, should the verdict be one of murder or manslaughter, and in this connection I have to examine the charge to determine whether the rules that may reduce murder to manslaughter were clearly and reasonably stated to the jury. I find the learned trial Judge in the charge in this respect dealt exhaustively with the rules that must be in view in determining murder or manslaughter as applied to the circumstances here, and after the best consideration I am enabled to give to the case I fail to find any error in this respect in the charge. The question of provocation, if any, by Lea was fairly discussed and I think fairly left for the jury's consideration. One complaint was urged by counsel for the prisoners against the charge in this connection. It was said that if the prisoners were drunk—that is, very drunk—the jury should have been instructed that on the question of provocation the prisoners were entitled to say that because they

were drunk ordinary rules should not apply to them. That is, the jury should have been instructed that if they were under the influence less would be considered as provocation in their case than in that of a sober man. In other words, that a person in liquor may more readily give way to passion on receiving provocation and that the jury should give a person in liquor this special consideration that would not apply to a sober man. A case of *Rex v. Thomas*, 7 C. & P. 817, was relied upon for this doctrine. I must decline to subscribe to any such doctrine, and I must also say that in my view there is no English authority for any such proposition. The question of what immunity a person who voluntarily makes himself drunk is entitled to has been recently carefully and fully considered by the Court of Criminal Appeal in England in *Rex v. Meade*, [1909] 1 K.B. 895. This case is instructive. On the facts it was one of beating. There the prisoner whilst drunk ill-used a woman by beating her with his fist. A blow by the prisoner ultimately caused death. The Court stated broadly that if he did do this (strike such a blow) and she died of the injury, and he intended to inflict serious bodily injury on her he was guilty of murder. It was contended on the trial that the presumption that the prisoner had this intent was rebutted because by reason of drunkenness he had no such intent. Under these circumstances it became necessary to consider the cases, ancient and modern, on the subject, and the Appeal Court, after expressly guarding themselves against being considered as saying anything that will confer any greater immunity on persons who voluntarily get drunk than they now enjoy, explicitly limited the immunity to a stated rule in words as follows:—

We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted in the case of a man who is drunk by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury.

This I take to be the English law to-day and should be followed here.

I have examined the directions of the Chief Justice on this point and am of opinion the charge in this respect was unobjectionable. It is hard to appreciate an argument in this case from the prisoners' counsel to the effect that the prisoners were drunk, and by reason thereof were entitled to some special instructions in their favour on that account, and because it was not given they should have a case reserved on the point, especially as the trial below was conducted on their part on the theory that they were all sober at the time in question. Indeed the prisoners took the stand and swore to their sobriety on the occasion. Nevertheless, I suppose that if they lied and the jury so thought, they were entitled to have the correct rule of the immunity as to drunken persons correctly stated, and this I find the learned trial Judge did in express terms.

The question of malice had to be dealt with and in my opinion was clearly, fully and correctly explained.

It is one of the leading rules found in all text-books that provocation will not avail to reduce murder to manslaughter where express malice is proved, and I think the question of malice under a full and correct explanation of its meaning in law was left for the consideration of the jury and found against the prisoners.

In connection with the attack on the charge herein, made by picking out isolated passages thereof, and, apart from the context, subjecting the same to criticism, I would call attention to what has often been said in the English Courts in that regard, and lately repeated by the English Court of Criminal Appeal in words as follows:—

But it is necessary to repeat what has often been said before in this Court, viz., that when a Judge sums up to a jury he must not be taken to be inditing a treatise on the law. He addresses himself to the particular facts of the case then before the jury, and no Judge can affect in those circumstances to give an exhaustive definition or one which applies to every conceivable case. It is enough if he gives a sufficient definition and rightly directs the attention of the jury to the facts of the case before them.

I would deny the motion.

MEAGHER, J., delivered a short opinion in which he said:—
I concur entirely with my brother Drysdale's well-reasoned opinion. My opinion is that leave should be refused.

*Leave to appeal granted, MEAGHER, and
DRYSDALE, JJ., dissenting.*

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSHEND, C.J., GRAHAM, E.J., AND
MEAGHER, RUSSELL, DRYSDALE, AND RITCHIE, JJ.

THE KING v. GRAVES.

(Decision No. 3.)

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—SUBSTANTIAL WRONG—INSTRUCTIONS.

A new trial in a criminal case will not be granted on the ground of misdirection if the general outlines and principles of law which should guide the jury in the particular case have been stated in the charge, although all possible qualifications or differences as regards the nature of the crime generally may not have been explained, it being essential for the granting of a new trial by an appellate Court under Cr. Code sec. 1019 that some substantial wrong or miscarriage should appear to have been occasioned on the trial. (*Per* Townshend, C.J., Meagher, and Drysdale, JJ., on an equal division of the Court.)

[The majority opinion in *Res v. Graves* (No. 2), 20 Can. Cr. Cas. 384, 9 D.L.R. 30, not followed; a new trial was subsequently granted on a further appeal to the Supreme Court of Canada.]

2. COURTS (§ V B—295)—STARE DECISIS—PREVIOUS OPINION ON THE MERITS BY SAME COURT.

The rule of *stare decisis* does not apply to bind a Court of criminal appeal, hearing a stated case sent up by its direction under Cr. Code (1906), secs. 1015 and 1016, from the trial Court after a conviction for murder, by the opinions on the merits expressed by the majority of the Court as constituted when the stated case was ordered on a motion for leave to appeal, although full argument had been then heard on the merits and a majority opinion expressed in expectation that the case might be dealt with *pro forma* in accordance with such opinion and without re-argument on the filing of the formal stated case; particularly where the Court on such motion for leave entertained doubt of its jurisdiction to determine the case on the merits without a formal case stated, and its formal order then made was accordingly limited to the granting of leave to appeal and a direction to the trial Judge to send up a stated case and did not purport to order a new trial or to quash the conviction, or otherwise to dispose of the case on the merits. (*Per* Townshend, C.J., Meagher, and Drysdale, JJ., on an equal division of the Court.)

[*Res v. Graves* (No. 2), 20 Can. Cr. Cas. 384, 9 D.L.R. 30, not followed; *Res v. Blyth*, 15 Can. Cr. Cas. 224, referred to.]

DECIDED : December 21, 1912.

By direction of the majority of the Court of Appeal the learned Chief Justice stated for the opinion of the Court the questions of law asked to be reserved, viz., 4 to 36 inclusive, omitting 35, with his reasons for refusing to reserve the same. He also appended as part of the case the evidence, and his charge to the jury, all contained in the appeal book. The grounds asked to be reserved, and from the refusal to reserve which the appeal was taken, the grounds for refusal and the charge to the jury to which exception was taken are set out in full in *The King v. Graves* (No. 2), 9 D.L.R. 30.

An application was made on behalf of the accused for a change of venue and the judgment on return of the motion is found, *The King v. Graves*, 5 D.L.R. 474.

W. E. Roscoe, K.C.:—The principles of law applicable to the case having been argued and decided I do not propose to argue what is *res judicata* so far as the matters that should enter into the consideration of the Court are concerned. I therefore content myself by making a formal motion to quash the conviction. On the judgments as delivered there is nothing further left for me to say, as the Court has disposed of the questions.

SIR CHARLES TOWNSHEND, C.J.:—In the report of my charge there is an omission that I did not notice until my brother Ritchie called my attention to it in his reference to one section of the Code that he said I did not mention to the jury. That is sec. 259 of the Code. I have here the original notes which I used on the trial shewing that I did mention that section.

Mr. Roscoe:—All I can say is that if it was mentioned I did not hear it.

SIR CHARLES TOWNSHEND, C.J.:—It was not mentioned in your points.

RITCHIE, J.:—I understand it to have been taken.

SIR CHARLES TOWNSHEND, C.J.:—I have here the notes that I was using on the trial.

Mr. Roscoe:—I did not hear anything about it and on that alone I based the ground that I have stated.

SIR CHARLES TOWNSEND, C.J.:—I direct it to be noted that I point out the omission in the report which is as follows:—

Then by sec. 259 it is provided, "Culpable homicide is murder (b) if the offender means to cause to the person killed any bodily injury, which is known to the offender to be likely to cause death, and is reckless whether death ensues or not."

In another place the charge should read, "If there is reasonable provocation and no malice" instead of "or no malice."

Mr. Jenks, K.C.:—I think the case reserved might be amended by reducing the number of questions. The case would be simplified and it would attain the same result. There are really only two questions: (1) Did the learned Chief Justice on the trial charge the jury properly; and (2) is there any evidence upon which a verdict of guilty of murder might be brought in. I think that sec. 28 covers the whole case.

MEAGHER, J.:—In my opinion we cannot amend the case either as to the questions or as to the matter of the charge.

Mr. Jenks:—I am only suggesting that it might be sent back to have the number of questions reduced.

MEAGHER, J.:—We have no power over it.

SIR CHARLES TOWNSEND, C.J.:—I do not like the way in which they are stated because they are so general.

Mr. Jenks:—So far as the case is concerned we argued the matter before and it is for the Court to say whether they wish to hear me further. I think that I said everything that I could before and unless the Court desires it I have nothing further to add now.

GRAHAM, E.J.:—I will have to consider whether the majority judgment is not a precedent that should be followed.

SIR CHARLES TOWNSEND, C.J.:—In my opinion it is in no sense *res judicata*. I think the Court went very far in discussing the whole thing. The case came up on appeal from my refusal to reserve a case and it was sent back to me to return questions, which I did. These are now before the Court to be

discussed entirely apart from anything that may have been said in the opinions read. Of course I may change my opinion.

GRAHAM, E.J.:—I am speaking of the question of a precedent of this Court—the opinion of a majority of this Court that I am bound by. I do not see that there has to be any re-argument of a matter that has been decided by a majority of the Court.

MEAGHER, J.:—I do not admit by my silence that I am assenting to any such view. My opinion is that this Court had no jurisdiction to give an opinion on the merits, beyond giving leave to appeal, until the case comes here in the form of a stated case.

RUSSELL, J.:—I think we had jurisdiction through the consent of counsel. By such consent we heard the case as if it had actually been reserved. It was a mere courtesy to refer it back to the trial Judge for a statement of the case and it was done merely to put in regular shape the judgment of the Court.

DRYSDALE, J.:—I have already given my opinion that there can be no expression of opinion on the merits without a stated case.

GRAHAM, E.J.:—When the application to appeal came before the Court composed of Meagher, Russell, Drysdale, and Ritchie, J.J., and myself, the learned counsel for the prisoners and the Deputy Attorney-General were heard at great length, the hearing extending over two days. My notes shew that at least 85 cases or authorities were cited, and while I do not profess to have examined them all, I did, in the preparation of my opinion, examine as many. Many things were argued which were not in the opinions ultimately delivered.

At the close of the hearing the learned Deputy Attorney-General proposed and the counsel for the prisoners agreed in open Court that the judgment on that application could be given as if a case had been stated, and without further argument, as was done in the case of *Rex v. Blyth*, 15 Can. Cr. Cas. 224, to which reference was made. My opinion and the opinion of the other Judges apparently were prepared on that footing. But the min-

ority objected to that course being taken, claiming in effect that a statement of a case could not be waived.

While holding the view that it was a proper course to take, I thought it expedient to proceed formally as the Court was sitting again within a week and the matter could be disposed of *pro forma*. So I changed the closing words of my opinion in favour of a new trial, so that it reads as it now appears in favour of having a case stated.

The opinions were accordingly delivered adversely to the Crown by Russell and Ritchie, JJ., and myself, Meagher and Drysdale, JJ., dissenting.

A case was stated by the learned Chief Justice.

Whatever opinion the Judges had as to whether or not the Court could dispose of the matter without a stated case, the Deputy Attorney-General at least was bound to his agreement that in effect there would not be further argument, and he appears to have been loyal to it, and neither he nor the counsel for the prisoners made further argument. And the prisoners are entitled to the benefit of that agreement made in open Court.

It cannot be said that they have not had the opportunity to present their case to the Court with the personnel changed. They could not be prejudiced anyway: *Attorney-General New South Wales v. Bertrand*, L.R. 1 P.C. 520. It is a sound principle in the administration of criminal law that prisoners should be fully heard. *Audi alteram partem* is a maxim peculiarly applicable.

There is another consideration. I do not say that in the ordinary case the judgment on an application for leave to appeal shuts out argument when the case stated comes on for a hearing. But when a case has been debated and opinions given as in this case, really with a view of disposing of it, there is much to be said in favour of that judgment constituting a precedent on the law of the case.

In 26 American and English Encyc. 160 it is said:—

An expression of opinion upon a point involved in a case argued by counsel and deliberately passed upon by the Court, although not essential to the disposition of the case, if a dictum, should be considered

a "judicial dictum" as distinguished from a mere *obiter dictum*, which is an expression originating alone with the Judge writing the opinion as an argument or illustration.

I incorporate herewith the opinion I delivered upon the application to grant leave to appeal.

For the reasons therein contained I think that there was error in the summing up, misdirection occasioning on the trial substantial wrong or miscarriage.

I rely upon the grounds in the case stated numbered as follows: 8, 9, 10, 11, 12, 18, 15, 17, 22, 31, 24, 28, 34 and 6, and answer them in a sense favourable to the prisoners.

I express no opinion on the other grounds, as it is unnecessary to do so.

The conviction in my opinion should be quashed and a new trial granted and the prisoners remanded.

RUSSELL, J.:—I do not consider that the questions now before the Court are *res adjudicata*, but I did assume that after the Attorney-General and the counsel for the defendants had both agreed that the whole matter should be dealt with on the appeal from the refusal of the learned trial Judge to reserve a case, as if a case had been reserved and that a final judgment should be pronounced and the opinions prepared and read were so prepared and read by a majority of the Judges who heard the argument in pursuance of that agreement, and with that understanding the proceeding now before the Court was to be a mere formality. I can understand that if the hearing on the appeal had resulted in affirming the conviction, it might have been desirable that a larger Court should be assembled to give the prisoners another chance for their lives, but inasmuch as the result of the former argument was to grant them another trial, it might well have been accepted as the final decision of this Court in the cause. As, however, this result has not been accepted as a finality and we are to deal with the matter again, I can only say that, having had an opportunity to read the comments of the learned trial Judge on the decision of the Court that heard the argument, I cannot see any reason to change my views.

I do not think the learned trial Judge correctly describes my opinion as having been constructed on the lines of an application for a new trial in a civil case. The argument was made by counsel that the case had not been fairly presented to the jury on the evidence, and I do not understand how the merits of that contention could well be adjudged without some reference to the facts of the case, to which I certainly had no intention to refer, except in so far as the reference was relevant to the complaint of misdirection. I may have been mistaken in assuming that it would be an error in law to instruct the jury to find as a fact that for which there was no evidence, or to put to the jury a proposition of law as bearing upon the issue if it necessarily assumed a condition of fact that did not exist. Beyond that I certainly had no intention to refer to the evidence, and certainly I should not have thought of reviewing the verdict of the jury. I thought I had made this very clear.

RITCHIE, J.:—On the application for leave to appeal it was agreed in open Court by the Deputy Attorney-General for the Crown and Mr. Roscoe, K.C., for the prisoners, that the judgment of the Court on the application for leave to appeal should dispose of the case and thus save the necessity of a re-argument of the points involved, and attention was drawn to *Rex v. Blythe*, 15 Can. Cr. Cas. 224, as an authority for this course. It was not then suggested either from the bench or at the bar that there was any objection to the course agreed on.

I accordingly wrote my judgment on the application for leave upon this understanding, and directed that the conviction be quashed and a new trial had. But before handing down the judgment two members of the Court expressed the opinion that the course agreed on was without jurisdiction. To avoid what then seemed to me an unnecessary difference of opinion, I changed that part of my judgment which quashed the conviction and ordered a new trial. I thought that when the stated case came on to be disposed of it would be a purely formal matter. As the learned Chief Justice had delivered a considered

opinion that there was no point worthy of being reserved, it did not occur to me that he would sit in the case on appeal. I am, of course, not expressing any doubt as to his right to sit.

For the reasons stated in my judgment on the application for leave to appeal (which I make part of this judgment), I am of opinion that the conviction against the three prisoners should be quashed and a new trial ordered.

I also desire to add that I entirely agree with the judgment of my brother Graham, delivered on the application for leave to appeal.

DRYSDALE, J.:—On the questions of law reserved in this case and stated by the Chief Justice, in obedience to the order of the Court, coming on for hearing, it was urged by counsel for the prisoners that inasmuch as the merits of certain questions had been considered by the Court that heard the appeal from the refusal of the Chief Justice to reserve the said questions, it was not open to this Court to again hear and determine such questions and accordingly that the motion to quash the conviction herein or to order a new trial should be considered as merely a *pro forma* motion.

I cannot understand this position. The only motion before this Court heretofore was whether or not a case should be stated in respect to certain questions of law raised on or incidental to the trial. A majority of this Court was of opinion that certain questions should be reserved and stated, and directed the learned trial Judge to state a case in respect to such questions.

This order has been obeyed and a case stated, and the questions of law so reserved and stated come now before us on the stated case for consideration.

I cannot understand the doctrine of *res adjudicata* suggested. Surely the only question before the Court on the former occasion was whether or not the trial Judge should reserve and state a case on points of law raised before him. The Court (by a majority in opinion) decided that he should and that is all that was decided. The opinions as a whole and the rule granted thereon will shew this.

Many points were urged on the appeal from the trial Judge's refusal to state a case that were not given effect to, and the result is that we have a case stated on certain points of law by the trial Judge now before us for consideration.

It is, I think, a somewhat startling doctrine that because certain members of this Court in their opinions directing a case to be reserved and stated, expressed themselves on certain questions in the case as it then appeared to them on the appeal from the trial Judge's refusal to reserve a case on questions of law should preclude the Court of Appeal from considering the questions so reserved and stated. The absurdity of such a position only requires to be stated. To my mind no further comment is necessary. If the Court of Appeal for Crown Cases Reserved is to be bound by the decision of a majority of the Court of Appeal that sat only to hear whether a case should be reserved and stated in respect to a point of law raised on the trial, then it is obvious that the Court of Appeal sitting to hear such points is useless, and a mere formality, and that the members of the Court that had only one question before them, viz., whether a case should be stated or not (even if a Court of three) could for all purposes bind the Court of Appeal specially sitting to hear the questions directed to be stated and reserved, even if the latter Court were differently constituted. and much larger in its component parts. If this were so, why state a case or direct a question or questions to be reserved?

I will not pursue the subject further, and would not have dealt with a matter so obvious, except for the fact that the prisoners' counsel's suggestions on this point and to this effect seemed to find some favour.

On the questions reserved and stated in obedience to the order of this Court by the trial Judge, I desire to say that although this Court by a majority directed that questions printed in the case as numbers 4 to 36 inclusive, excepting 35, be reserved, the only real question involved is whether or not there was misdirection on the part of the trial Judge, that is to say, misdirection in law. When the case was formerly before us on the ques-

tion whether the trial Judge should reserve and state a case or not, I discussed this point as fully as I deem necessary.

With all respect to my learned brothers, whose opinions I have heard and also read, I am bound to say I have not changed my opinion, and incorporate it herewith. I think there was not error in law on the part of the learned trial Judge, and I am of opinion that the conviction herein was warranted and ought to be affirmed, and I have only to repeat here my former opinion on the merits of this case.

MEAGHER, J.:—When the application for leave to appeal was heard I was strongly of opinion that we should not express any opinion upon the merits unless one reached the conclusion to refuse the application. I was quite persuaded we had not the material called for by the statute before us, nor in the form prescribed by it, nor stated by the trial Judge, and for that reason we had no jurisdiction to go beyond granting or refusing the leave sought; and that consent could not dispense with the requirements of the statute. I have been unable to find any case where the Privy Council, except perhaps where refusing leave to appeal, has disposed of the case upon the merits on the application for leave to appeal, and I feel fully convinced it never adopted such a course. With all becoming deference I submit that there is neither force nor merit in the ground urged, that the matter was *res adjudicata* because of the opinions expressed when the motion for leave to appeal was disposed of. My learned brothers Graham and Ritchie were of opinion that leave to appeal should be granted, while my learned brother Russell was of opinion, because of the alleged consent, that the convictions should be quashed at that stage. My learned brother Drysdale and myself were of opinion that the motion should be refused.

Upon this record the most that can be said is that the leave was granted, and in the result the situation is the same as if a Judge in granting an order for a certiorari, or a writ of habeas corpus, expressed an opinion upon the merits. In such a case

it would be altogether impossible to say, as a matter of law, that there had been an effective adjudication which would control the parties or any Judge or Court hearing it at a later stage. If the consent and the decision upon the motion were so effective as to be binding upon the Court and the parties, why direct a case to be stated for the purpose of a hearing on the merits? A more idle proceeding, in view of the point now urged, could hardly be ordered.

In *Re Abraham Mallory Dillet* (1887), 12 A.C. 459, it was held:—

that Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done,

approving in that connection of *Falkland Islands Co. v. The Queen*, 1 Moo. P.C.N.S. 312.

Re Abraham Mallory Dillet, 12 A.C. 459, was followed in *Ex parte Deeming*, [1892] A.C. 422, and again in *Ex parte Kops, Kops v. R.*, [1894] A.C. 650.

The principle thus enunciated is, I venture to think, binding upon this Court as well as upon the Supreme Court of Canada under its constitution and its relation to the Privy Council; but if not actually binding, it furnishes a guide we should follow without hesitation. My opinion upon the merits is that the convictions should be affirmed.

SIR CHARLES TOWNSEND, C.J.:—Before the argument was commenced on the stated case I informed the Court there had been an omission in the report of my charge only noticed by me on reading the opinion of one of the Judges given on the appeal from my refusal to reserve the question asked for. I directed the case to be amended accordingly. The omission was as follows:—

Then by sec. 259 it is provided, culpable homicide is murder (b) if the offender means to cause to the person killed any bodily injury, which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Also a further error in reporting the word "or" when it should have been "and" in a citation given.

Counsel were then called on to proceed with their argument. Mr. Roscoe claimed that the opinion of the three Judges on the appeal from my refusal was binding, or, as he expressed it, was *res adjudicata*, and said nothing further. After pointing to the statute which made that hearing merely a preliminary hearing, as to whether a case should be stated or not, which could have no binding effect on the Court now hearing the points reserved, the argument proceeded. One of the Judges intimated that counsel had consented that the arguments then made should deal with the whole matter, and that there would be no further argument. The Deputy Attorney-General, Mr. Jenks, agreed to that so far as it would not be necessary to repeat the argument, but said he had not waived any right to be heard in case a reserved case was stated—that at the time such consent was given the majority of the Judges had intimated that they could dispose of the whole matter at that hearing, but that afterwards all the Judges but one had decided that a case must be regularly stated for the opinion of the Court—and that for both reasons he claimed the right to make any further argument he wished, to which the majority of the Court agreed. At the conclusion of Mr. Jenks' argument for the Crown the Court adjourned until the next day for further consideration and on that day delivered judgment, dismissing the prisoners' contentions and affirming the conviction.

I have had the advantage in this case not only of hearing the arguments of the counsel for the defence as well as for the Crown, but am necessarily familiar with all the facts and circumstances of the case. I have also had the advantage of reading and carefully studying the opinions of my brethren who have taken different views of the questions before the Court.

After giving the best consideration to the whole matter I have come to the conclusion that the opinion of Mr. Justice Drysdale, concurred in by Mr. Justice Meagher, is a correct and

a full exposition of the law which must govern us on the questions reserved for the Court in this case.

Before dealing with any of these questions in detail, I would call attention to the fact that this is not an appeal to the Court under sec. 1021 of the Code, in which it is provided that leave to appeal may be given to the person convicted, for a new trial on the ground that the verdict was against the weight of evidence. We have no such question before us. The proceedings now are exclusively under secs. 1014, 1015, 1016, 1018 and 1019 of the Code. Under these sections nothing can be considered, except such questions of law as the Judge may be asked to reserve, either on the trial or subsequent thereto, arising out of the direction of the Judge. The questions asked to be reserved in this case number 36, all of which I refused to reserve because, as I have stated in my reasons, none of them raised any question of law respecting which there could be any reasonable doubt and most of them raised no questions of law, unless it was some objection to the general character of my charge in commenting on facts in evidence to the jury. The majority of the Court on appeal, however, have thought proper to direct the reservation of the questions asked for, from questions 4 to 36 inclusive, excepting No. 35.

I need hardly repeat here that those questions were not in my opinion of a sufficiently definite character as to what the questions of law were. As, however, they are now before us I will express my opinion as briefly as possible on them.

I would submit generally that the fundamental error, going through the opinions of my brothers, Graham, Russell and Ritchie, is that they undertake to deal more or less with questions of fact which were for the jury and not for them, under this procedure. My brother Russell deals with the whole matter as if it were a motion for a new trial in a civil case, apparently overlooking the fact that on such an appeal he could only consider questions of law which have been asked to be reserved and refused. He discusses and decides questions of evidence

and weight of evidence which clearly cannot be done on such an application as this. Take for instance this passage:—

There is positively no evidence whatever of any assault at this stage of the proceedings, nor any evidence whatever to warrant finding that the defendants had any intention beyond that of disarming the deceased. Of course there was no evidence of that intention either.

Now the learned Judge as I have said had no right to deal with such a question whatever, even if he were correct, but he is obviously incorrect, and such evidence as there was was duly submitted to the jury for their decision as a matter of fact. Here is the way in which it was placed in the charge before the jury:—

Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way of conveying to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hand and using the stock to defend himself against their assault, they are responsible for the consequences.

Now, I respectfully submit that this was a correct statement of the law. I do not discuss the evidence, as I have already indicated, that does not properly come up here.

Take again this passage:—

It is altogether possible, and I should judge highly probable, that the deceased inflicted a mortal wound upon himself by his manner of using the gun, which resulted in its accidental discharge. It is possible also, though it will perhaps be considered improbable, that the fatality resulting from the wound was not accelerated by the conduct of the defendants any more than it was by the removal of the patient to Halifax.

Here let me call attention to the fact that the learned Judge is considering a question not before him and is usurping the functions of the jury who had all the evidence before them and decided the other way.

Then the learned Judge puts a number of hypotheses on the facts which, he thinks, if they had been put before the jury fairly and dispassionately, they might, after consideration, have come to a different conclusion and he does not see how they could

have been rejected by the jury without more than a reasonable doubt and that they might have reduced the crime from murder to manslaughter. He seems to think that these were never presented to the jury for their consideration. I think the best answer to such an observation is to refer to the charge itself and to that portion which he himself has quoted to shew that all such considerations as were proper were fully presented for the consideration of the jury. He further finds fault with the charge for not explaining that the word "felony" had been abolished from the Code and that it does not explain the change which has been brought about by our amendment to the common law, but it is sufficient to point out that such an explanation was unnecessary and would have had no connection with the responsibility of the defendants in this case. They were instructed over and over again that if these defendants were engaged in an unlawful act, and that act was acting in a disorderly manner and trespassing on Mr. Lea's property with the result of what occurred, then they were responsible for it. *Vide* Code, sec. 252, sub-sec. (2).

It is unnecessary further to comment on the reasons given by my brother Russell in his opinion, as I think they are based throughout on an erroneous view of the statute under which the Court were hearing the matter.

With respect to the grounds on which Mr. Justice Ritchie decides, he seems to be under the impression that the statute defining murder or culpable homicide (sec. 259 of the Code) must necessarily have been read to the jury and they should have been asked to find these questions:—

Did the defendants mean to cause the death of Mr. Lea? Did the defendants mean to cause Mr. Lea bodily injury, known to be likely to cause death, and were they reckless as to whether death ensued or not?

And for this reason he thinks the law was not properly stated.

I might point out that it would be hardly useful to submit such questions to the jury when I had instructed them that

there was not the slightest evidence of premeditated murder and that I thought they had no intention of doing anything of the kind, not even a bodily injury, but that what occurred arose after they came there.

I may further add that provided the Judge properly explains the difference between murder and manslaughter and what would constitute murder there is no necessity for reading the statute, in fact it would, in my opinion, convey nothing that the jury could properly understand. But whatever force there might be in such an objection it is now clear under the amended report that sec. 259 was read to the jury.

Then again my brother Ritchie says:—

I think it could not be said that it is a reasonable or natural thing for a man to point the barrel of a gun which he knows to be cocked and loaded at his own body and strike at another with the stock.

Now with all respect I submit that whether such a thing was reasonable is a question for the jury and not for the Judge and more than that it is not one of the grounds asked to be reserved in this case. I would call attention further to question 9 numbered in his opinion, viz.:—

Whether the direction that the defendants were responsible if he did not do as he did, and provided that what he did was reasonable under the circumstances.

I can find no such question reserved under question 9 or any other question.

Now the opinion of my brother Graham is of great length and shews marks of great industry and study and deals in a more detailed manner with the questions reserved and it would be undesirable in such a brief opinion as this to go over it in detail and point out what I consider the mistaken views therein expressed. As in the case of the other opinions, he undertakes to deal with questions of fact to some extent which, as I have said before, were clearly not before him. Both he and Mr. Justice Ritchie comment on the three cases from the English reports which were mentioned to the jury as illustrations, that a man might be guilty of murder or manslaughter even though he does not strike the blow which caused the death of the deceased,

but if he was the direct cause of the deceased inflicting the blow or doing the act which resulted in his death, that he would be responsible for it. A simple reading of the charge will shew anyone that these cases were not put before the jury for the purpose of shewing the difference between murder and manslaughter but merely for the purpose of clearing up a common idea that because Mr. Lea held in his own hands the gun the discharge of which inflicted the wound which approximately contributed to his death the accused were not responsible for that part of the affray. Therefore it was unnecessary to give the explanations referred to in Mr. Justice Ritchie's opinion as to their effect further than that.

Again it is said that the jury should have been instructed that Mr. Lea must have been in fear of violence or assault. Now I think that that view of the situation was over and over again submitted to the jury. The word "fear," it is true, was not used, but if language can convey anything, it is sufficiently before them. The part of the charge referring to that is as follows:—

Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way to convey to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hands and using the stock to defend himself against their assault, they are responsible for the consequences.

As very well stated in the learned Judge's opinion referring to the case put for illustration:—

These cases have found a place in the Code first mentioned and are all founded upon the conditions of deceased being put in a state of fear by the violence of the defendants, namely, that the deceased in doing the act which caused his death, was moved by a well-grounded apprehension of immediate violence; under these circumstances the theory is that the act of the deceased cannot be regarded as voluntary, but is merely the exercise of a choice between two evils and so is directly dependent upon the act creating the condition which required the election.

We know what occurred here. The circumstances of what

occurred were given in evidence before the jury. The evidence shewed the defendants in a drunken and disorderly condition on Mr. Lea's private grounds in front of his house, refusing to depart when requested, swearing at him and abusing him and frightening his family. It shewed a bottle either thrown at him or that he was struck at with it. It shewed a rush towards Mr. Lea on the plank sidewalk. It shewed Mr. Lea had reversed the gun. It shewed that he had struck one of the defendants. It showed that he fell to the verandah wounded and these men were around him, kicking him. Would not the jury be justified in inferring from that that there was fear on the part of Mr. Lea when he reversed the gun and when he struck at them? Must they not have come towards him, or rather could not the jury have believed that they rushed towards him with intent of assaulting him or had assaulted him and that Lea in fear of that used his gun as he did? Was not that sufficient to justify the jury in finding that there was well-grounded fear of assault or violence on the part of Lea when he struck at them? Again it is said that the question of provocation was not properly stated. I think it unnecessary to say more on that subject than to point to the language twice over in the charge. It was not for the Judge to suggest what might be a possible cause of provocation but to do as he has done, tell the jury that from all that has transpired, they can judge whether there was provocation or not, and if there was, that would reduce the crime from murder to manslaughter. The learned Judge seems to think that the word "malice" was not sufficiently explained to the jury and that it was apt to confuse them. I can only point out that malice, and what constituted it, was over and over again, in as clear terms as possible, explained to the jury and I think that, notwithstanding my learned brother's opinion, such explanations were more easily understood by the jury than if I had read them a clause from the Code, as he thinks I ought to have done, and which I did read. But when we are told by the learned Judge as follows:—

Now in the legal sense of malice there was in my opinion in this branch of the case nothing worth submitting to a jury.

Such a statement as that, in the face of the evidence of three or four witnesses as to the malicious feelings which these defendants bore to Lea, I think requires no comment from me. Again the learned Judge says:—

I think this case is too serious a one to leave it to a jury to find for murder or manslaughter according as they find whether there was or was not malice in the sense of ill-feeling, etc.

I confess that I had always thought and will continue to think until I am corrected by a higher Court that whether there was malice was peculiarly a question for the jury and no one else.

Another statement in his opinion requires some observation as follows:—

Moreover, I think that this case should not have been submitted to the jury, as if there was no alternative, but one of either murder or manslaughter. I have dealt with gunshot wound. If there was no acceleration there was an alternative of acquittal.

I really am unable to appreciate such an observation when I am told that I ought to have charged the jury that they could acquit these defendants under the facts of the evidence, that is to say, the jury were to be told that in face of the riotous, disorderly conduct of these men, in the face of their assault upon Mr. Lea, in the face of their maltreating, abusing him, kicking and finally doing the acts which led to his death, that the jury should have been instructed that they might be acquitted. It is unnecessary to say more.

Now on the question of acceleration of death, so far as I can form any opinion, my learned brethren have not shewn any sound legal reason why the verdict should be set aside on that finding. The evidence as to the acceleration of death is complete. It was for the jury and not for the Court to say whether Mr. Lea's death was accelerated by these defendants or not. They have said that it did accelerate it and that is the end of the matter.

If it were necessary for the Judge in summing up to go into all the minutæ and shades of difference in the crime for which the prisoners have been indicted, with all the detail of a text-book, in my view it would be almost impossible to give direc-

tions which might not afterwards, when examined under a legal microscope, be found faulty in some minor and immaterial particular. It was for this reason that sec. 1019 was placed in the Code, which provides that:—

No conviction shall be set aside nor any new trial directed, although it appeared . . . or some misdirection given, unless it appears that some substantial wrong or miscarriage was thereby occasioned on the trial.

Now it seems to me if I succeed in placing before the jury the broad, general outlines and principles of law which should guide them without material error their verdict should not be disturbed.

Assuming for the moment there was error in the direction on some point, I venture to assert that in regard to the acceleration of Lea's death by defendants, there can be no doubt either as to the direction or the evidence on which the jury founded their verdict. The charge on that subject is as follows:—

Even if the man was wounded and would have died anyway, yet if his assailants committed acts which made him die sooner, it amounts to murder, assuming that malice was present. If the medical testimony satisfies you that Lea's death was hastened by the subsequent treatment which he received at the hands of the accused, you are justified on that ground in finding them guilty of murder or manslaughter. The Code (sec. 256) is very clear about that. It says: "Everyone who, by any act or omission, causes the death of another, kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause." That is this case. Although the prisoners may not have been responsible for inflicting the gunshot wound, if they hastened his death by their rough treatment and ill-usage of him, subsequently, they are responsible for murder or manslaughter according as you find that malice was or was not present.

Now I have made these observations as I deem it necessary and right to put my views properly before the Court of Appeal in the event of this case going further. I feel that what I have said is very imperfect, but in view of the opinion of my brother Drysdale, which so completely and fairly disposes of all the questions reserved, I think it unnecessary to say more.

*The Court being evenly divided, appeal
dismissed and conviction stands.*

[SUPREME COURT OF CANADA.]

BEFORE SIR CHARLES FITZPATRICK, C.J., AND DAVIES, IDINGTON,
DUFF, ANGLIN AND BRODEUR, JJ.

OUDMET v. BAZIN.

1. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—THEATRES—
B.N.A. ACT, SEC. 91, SUB-SEC. 27.

The Act, 7 Edw. VII. (Que.) ch. 42, as amended by the statute 9 Edw. VII. (Que.) ch. 51, which, among other things, prohibits, under penalty, the giving of theatrical performances on Sunday for gain except in case of necessity or urgency, is void because it is criminal legislation which, under sec. 91, sub-sec. 27 of the British North American Act, is exclusively within the power of the Dominion Parliament to enact.

[*Attorney-General v. Hamilton Street R. Co.*, [1903] A.C. 524, 7 Can. Cr. Cas. 331, followed; *Russell v. The Queen*, 7 A.C. 829; *Re Sunday Legislation*, 35 Can. S.C.R. 581; *Pringle v. Napanee*, 43 U.C.R. 285; *Cowan v. Milburn*, L.R. 2 Ex. 230, and *Vidal v. Girard's Executors*, 43 How. U.S. 198, referred to.]

2. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—DOMINION
LORD'S DAY ACT—R.S.C. 1906, CH. 153, SEC. 16.

The statute, 7 Edw. VII. ch. 42, as amended by ch. 51, 9 Edw. VII. of Quebec, which, among other things, prohibits, under penalty, the giving on Sunday of theatrical performances for gain, is prohibitive and not permissive, and cannot be upheld under sec. 16 of the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, which permits provincial legislatures to except from its operation any act which provincial legislation, existing at the time the Federal Act came into force or which might be subsequently enacted, "permitted" to be done.

DECIDED: May 7, 1912.

AN appeal from the Court of King's Bench, appeal side, for the Province of Quebec.

This case raises the question whether or not the Quebec statute 7 Edw. VII. ch. 42, as amended by the Act 9 Edw. VII. ch. 51, is within the constitutional jurisdiction of the Provincial Legislature. The legislation in question enacted regulations to prevent the profanation of the Lord's Day. The appellant was convicted on a complaint charging him with carrying on the business of theatrical representations on Sunday for profit, without necessity or urgency. He obtained the issue of a writ of prohibition against the police magistrates by whom he was

convicted in the city of Montreal upon several grounds, of which the important question in dispute on the appeal to the Supreme Court of Canada was as to the constitutionality of the statutes mentioned. The magistrates and the Attorney-General for Quebec contested the action and the writ was quashed, in the Superior Court, by Pagnuelo, J., on the ground that the Federal Lord's Day Act had the effect of validating the Provincial legislation. This judgment was affirmed, on appeal, by the Court of King's Bench, by a majority of that Court, Trenholme and Cross, JJ., dissenting.

The appeal was heard on the 26th of October, 1911.

Aimé Geoffrion, K.C., and *J. O. Lacroix*, K.C., for appellant.
E. Lafleur, K.C., and *D. Brodeur*, K.C., for respondents.

Judgment was delivered 7th May, 1912, by which the appeal was allowed with costs, BRODEUR, J., dissenting.

SIR CHARLES FITZPATRICK, C.J.:—The object of this appeal is not to ascertain whether on some technical ground the information, which is the basis of these proceedings, can be sustained; but to test the constitutional validity of sec. 2 of the Quebec Act 7 Ed. VII. ch. 42, as amended by 9 Ed. VII. ch. 51. That section is in these words:—

No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

The contention of the respondent is that it was competent to the Quebec Legislature to enact that section on the ground that it is in the nature of a municipal or police regulation of a purely local character. It is also argued that an act or default may be forbidden by statute in such a way that the person guilty may be liable to a pecuniary penalty which is recoverable as a debt by civil process by a private person, or, in some cases, only by an officer of the Crown. Such an act, or default, is an offence against the statute but not a crime: Halsbury's Laws of England, vol. 9, p. 233, note.

I most regretfully have come to the conclusion that the section in question is not a local, municipal or police regulation, but legislation designed to promote public order, safety and morals; and that it purports to deal with a subject, "the observance of the Sunday" which is not within the legislative jurisdiction of the Provincial Legislature, and which is already the subject of criminal legislation: 29 Charles II. ch. 7, part of the criminal law of England declared to be in force by the Quebec Act, 14 Geo. III. ch. 83. It must be accepted as settled that "criminal law," in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament. This statement must of course be taken subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the "enumerative heads" of section 92 of the British North America Act. In *Attorney-General of Ontario v. Hamilton Street Ry.*, [1903] A.C. 524, their Lordships, it is quite true, gave no opinion with respect to the validity of the section of the Act they were considering (R.S.O. 1897, ch. 246) by which tramway companies were, subject to certain exceptions, prohibited from working their trains on Sunday; but they held the phrase "criminal law" in section 91 of the British North America Act free from ambiguity and that construed by its plain and ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say, with offences against society rather than against the private citizen. Apply this test: assuming a breach of the prohibition, what private right could possibly be affected and for what conceivable violation of the section would a private citizen have recourse? In *Russell v. The Queen*, 7 A.C. 829, at p. 838, their Lordships say: "Laws of this nature (Canada Temperance Act) designed for the promotion of public order, safety and morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. Austin tells us, *Jurisprudence*, Lect. XXVII.:

In short the distinction between private and public wrongs or civil injuries and crimes would seem to consist in this:—

Where the wrong is a civil injury, the sanction is enforced at the discretion of the party whose right has been violated.

Where the wrong is a crime, the sanction is enforced at the discretion of the Sovereign.

Applying this rule to the section, in what respect can it be said that working on Sunday, or attendance at theatrical performances or excursions on that day, the things that are forbidden, constitute a civil injury for which the private individual has a remedy? The penalty, in case of breach, belongs to the Crown and can only be recovered under the summary conviction sections of the Criminal Code. It would appear also as if section 7 of the Provincial Act was intended to prevent the enforcement of the penalty, except at the discretion of the Sovereign acting through the Attorney-General. It appears to me on the whole abundantly clear that the intention of the Legislature was to forbid certain things which, in its opinion, are calculated to interfere with the proper observance of Sunday. In the *Hamilton Street Ry.* case their Lordships hold, impliedly at least, that Christianity is part of the common law of the Realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal: see also *Pringle v. Napanee*, 43 U.C.R. 285; *Cowan v. Milburn*, L.R. 2 Ex. 230; *Vidal v. Girard's Executors*, 43 Howard's Reports S.C. at p. 198.

It is impossible for me to believe that the Legislature intended, by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act, which is described as "A law concerning the observance on Sunday," and, as Sedgewick, J., speaking for the majority of this Court, said in *O'Connor v. N. S. Telephone*, 22 Can. S.C.R. 276, at p. 293: "We cannot with propriety shut our eyes . . ." *Vide also Fielding v. Morley Corporation*, [1899] 1 Ch. 1, where it was held that "The title of an Act of Parliament is to be read as part of the enactments."

The profanation of the Lord's Day was an indictable offence at common law: 2 Chitty's Criminal Law (2nd ed.) p. 20; Encyclopaedia of the Laws of England, vbo. Sunday (vol. 13). Blackstone classifies those laws under the criminal law (offences against religion, morals and public convenience) and says: "Profanation of the Lord's Day vulgarly but improperly called Sabbath-breaking is another offence of the class now in question": 4 Stephens Com. Bk. VI., ch. 9. In the enumeration of offences which may be tried summarily, Halsbury (vol. 9, No. 161) includes at p. 80 those arising out of breaches of the Sunday observance law (29 Chas. II. ch. 7): see also *Rawlins v. Ellis* (1846), 16 M. & W. p. 172. In the Report of the Commissioners on Criminal Law, vol. 2, at p. 81, under the general heading of "Offences Against Religion," the Commissioners say:—

Certain religious observances, such, for instance, as that of the Sabbath, may properly be conceived as exercising so important and beneficial an influence on moral conduct, that the wanton violation of them ought to be prevented by penal laws. The other general principle which we have above referred to as furnishing a legitimate foundation for all laws of the class we are now considering may also, to a certain extent, be applicable, namely, that with respect to institutions and observances which carry strongly with them the opinions and feelings of the community, and open defiance of them may justly be the subject of punishment.

In the absence of Provincial enactments which make sections 889, 1124 and 1125 of the Criminal Code applicable to prosecutions under the Quebec Laws—and we have not been referred to any—I would hesitate to hold with Mr. Justice Cross that the charge

although set out and made as for offences against the ineffective provincial Acts . . . should not fail merely because of its having been laid as a violation of a wrongly cited statute, if it were in other respects a charge of an offence known to the law and triable by a magistrate.

I have always understood the rule to be that a prosecutor could not ground the one charge in his information upon two Acts passed one by Parliament and the other by a Provincial Legislature which contain separate and distinct provisions, no

more than a statutory offence could be blended in the same count with one at common law.

I would allow the appeal with costs.

DAVIES, J.:—This is an appeal from the judgment of the Court of King's Bench of the Province of Quebec quashing a writ of prohibition issued against the police magistrates of the city of Montreal prohibiting them from proceeding further in certain prosecutions against appellant, Ouimet, for having had on the first and eighth days of August "for profit without necessity and urgency carried on a business and given theatrical representations on Sunday."

The complaint was made and the prosecutions instituted under the Quebec Acts, 7 Ed. VII. ch. 42, and 9 Ed. VII. ch. 51. The former is entitled "Law Concerning the Observance of the Lord's Day."

The principal sections are as follows:—

1. The laws of this Legislature, whether general or special, respecting the observance of Sunday and in force on the twenty-eighth day of February, 1907, shall continue in force until amended, replaced or repealed; and every person shall be and remain entitled to do on Sunday any act not forbidden by the Acts of Legislature, in force on the said date, or subject to the restrictions contained in this Act, to enjoy on Sunday all such liberties as are recognized by the customs of this Province.

2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

Sections 3 and 4 provide for punishment for offence against the Act by fines and imprisonments.

Sec. 5. Nothing in the present Act shall repeal the Acts of this Legislature now in force concerning the observance of Sunday, nor any by-laws passed thereunder, which laws and by-laws shall continue in full force and effect until amended, replaced or repealed according to law.

The amendment of 1909 increases the fines and imprisonment for subsequent offences.

The question raised for our consideration is as to the con-

stitutionality of these Acts; that is, whether they were as a whole *ultra vires* of the Legislature of Quebec.

I was one of the Judges of this Court who on a reference from the Governor-General in Council, "In the matter of the jurisdiction of a Province to legislate respecting abstention from labour on Sunday," advised him in answer to a question submitted to us as to whether the Legislature of a Province had authority to enact a statute in the terms of a draft bill annexed to the question [*Re Sunday Legislation*, 35 Can. S.C.R. p. 581].

That we were unable to distinguish the draft bill then submitted for our opinion from the Act pronounced as *ultra vires* of the provincial Legislature by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that Province in the matter of the Hamilton Street Railway Company, reported in appeal to the Judicial Committee of the Privy Council, [1903] A.C. 524.

The Judges of this Court who joined in giving that answer were of opinion that

the day commonly called Sunday, or the Sabbath, or the Lord's Day, is recognized in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

Turning for a moment to this decision of the Judicial Committee in which it was held that the Act there in question, R.S.O. 1897, ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole was beyond the competency of the Ontario Legislature to enact, it will be seen that this Act was originally enacted by the late Province of Upper Canada before 1867, the Legislature of which was competent for the purpose, but was consolidated and amended by extending and enlarging its provisions by the Act of the Province of Ontario passed in 1897. It was the validity or constitutionality of the consolidated Act that their Lordships were called upon to determine. Had the Legislature of Ontario the power to re-enact the original Act in its original form or to re-enact it, enlarging its scope and extending its provisions

prohibiting work on Sunday? The answer of their Lordships shortly was that the Legislature had no such power because the Act treated as a whole was beyond its competency to enact. The reasons for their conclusion given by the Lord Chancellor are short and to the point. He says:—

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sec. 91, sub-sec. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law in its widest sense is reserved for the exclusive authority of the Dominion Parliament.

The pith of this judgment lies in the meaning they gave to sec. 91, sub-sec. 27, of the British North America Act, 1867, reserving for the exclusive authority of the Parliament of Canada "the criminal law except the constitution of Courts of criminal jurisprudence," and in their judgment the words "criminal law" as used in sec. 91 of our constitutional Act, means criminal law in its widest sense.

I have heard nothing to induce me to change the opinion which I joined with my brother Judges in giving to the Governor-General in Council on the draft bill for prohibiting on Sunday the performance of work and labour, transaction of business, engaging in sport for gain and keeping open places of entertainment. Nor am I able to discover any substantial distinction between the Act of the Legislature of Quebec we

are now considering and the draft bill upon which this Court in 1905 gave its opinion.

The object and purpose of each was to prohibit on Sunday the performance of work and labour, transaction of business, or giving or taking part in theatrical performances, etc.

I do not mean to say that the Quebec legislation now in question and the draft bill on which the opinion I have referred to cover the same ground. The prohibitions in one differ somewhat from those in the other and those in the draft Act are doubtless broader and more extensive than in the Quebec Act.

That, however, cannot affect the right to legislate on the subject matter dealt with which is the same in both cases. I am of opinion that they are both beyond the competence of the Provincial Legislature as being within the exclusive right of the Parliament of Canada under sub-sec. 27 of sec. 91 of our constitutional Act, "the criminal law except the Courts of criminal jurisdiction."

I add this qualification that the first and sixth sections of the Quebec Act now before us, 7 Ed. VII. ch. 42, may be said to permit certain things or acts to be done on Sunday prohibited by the Federal Act of 1906, and in so far as it does so permit these sections may be *intra vires* the Quebec Legislature under the powers delegated and conceded to it by the Dominion legislation.

But it is contended that the Legislature derived from the above Federal Act power to legislate on the subject of Sunday observance and that such provincial legislation "validated" and gave life to legislation which might otherwise be *ultra vires*.

My construction of the Federal Act is that it was an attempt to enact generally prohibitive legislation with regard to the proper observance of Sunday or the Lord's Day for the whole of Canada. But that recognizing the different circumstances, habits, customs and religious beliefs which prevailed in the several Provinces of the Dominion, Parliament determined to delegate to each provincial Legislature the power to declare that any act or thing prohibited by the Dominion Act might be excepted

from the operation of such Act and permitted to be done by provincial legislation existing at the time the Federal Act came into force or subsequently enacted.

As to the power of the Parliament of Canada so to delegate its power I have no doubt whatever our statutes are full of legislation of a similar kind and holding the Parliament of Canada to be a Sovereign Parliament within its powers as defined by our constitutional Act, I cannot doubt that legislating within these powers it can delegate to another person, body or authority the power to make a law as binding and effective as if embodied in one of its own statutes.

If I have properly construed the power of the Parliament of Canada to legislate exclusively on this subject of the observance of Sunday or the Lord's Day and have also properly construed the Federal Act of 1906 on that subject, the only question to be answered respecting the validity of the provincial legislation on the subject now before us is whether it is legislation permitting something to be done on Sunday which has been prohibited by the Dominion Act. If it is, such legislation is valid because power so to legislate is given by the Federal Act. If on the contrary the provincial legislation is in itself prohibitive and not permissive, and just so far as it is of that character it is *ultra vires*.

Applying this rule to the second section of the Act now before us and under which the prosecutions were brought and limiting my opinion to the one point desired by counsel to be determined, I conclude that it is legislation beyond the competence of the Legislature and that therefore this appeal must be allowed and the judgment quashing the writ of prohibition vacated with costs.

IDINGTON, J.:—The appellant seeks to have respondents prohibited from proceeding with the trial of charges laid before the police magistrate of Montreal alleging an infringement of 7 Ed. VII. ch. 42, as amended by ch. 51 of 9 Ed. VII., passed by the Legislature of the Province of Quebec.

The second section of the latter Act is as follows:—

2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

The question raised is as to the power of the Legislature to so enact.

It is claimed this is criminal legislation within the meaning of sec. 91, sub-sec. 27, of the British North America Act, which assigns the exclusive power of legislation on the subject of "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" to the Parliament of Canada.

There are two summonses in the appeal case presented; one of the 14th of August and the other of the 21st of August. The former makes the charge without specifying the statute it infringes. The latter specifically assigns a contravention of the statutes above referred to. Singularly enough both allege as if a single offence what to my mind clearly covers two offences against the Act.

The above quoted statute clearly constitutes a distinctly independent offence or perhaps two in prohibiting the doing of "any industrial work or business" and by the following words other independent offences. Each is thus described and separated by the disjunctive "or."

But in the summons they are coupled together by the conjunctive "and" which is not the language of the Act.

The parties desire to have the constitutional question determined and raise no point regarding this objectionable misjoinder or offences which in itself is possibly amenable by the magistrate if objected to.

It is therefore not in that sense I refer to this minor matter but to bring out in relief or so far as I can the real meaning of the statute as I read it.

If objection had been taken to this misjoinder and the magistrate had refused to amend and convicted and made his conviction follow the exact language of the summons or of the statute,

his conviction would have been bad in form and liable to be quashed for thus embracing two offences in one conviction or bad from uncertainty arising from its alternative form which would therefore cover neither offence.

Tested thus we have in the same section a number of new offences created of which one is doing or causing "to be done any industrial work" and another is pursuing "any business or calling."

This latter is said and I assume it to be a bad translation of the French version, "un . . . négoce."

That being assumed does not mend matters much for the present argument. It still leaves an enactment of a very wide comprehensive meaning and I venture to think almost if not altogether as much so as the Ontario enactment, R.S.O. ch. 246, sec. 1, which was before the Judicial Committee of the Privy Council in the case of *The Attorney-General of Ontario v. The Hamilton Street Ry. Co. and others*, [1903] A.C. 524, and which reads as follows:—

1. It is not lawful for any merchant, tradesman, farmer, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day, to sell or publicly show forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted).

The first question submitted to the Court of Appeal for Ontario and brought by way of appeal therefrom under the consideration in said case of the Judicial Committee was as follows:—

1. Had the Legislature of Ontario jurisdiction to enact ch. 246 of the Revised Statutes of Ontario, 1897, intituled "An Act to prevent the Profanation of the Lord's Day," and in particular sub-secs. 1, 7 and 8 thereof?

The Court speaking through the Lord Chancellor disposed of it as follows:—

The Lord Chancellor:—Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole,

was beyond the competency of the Ontario Legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by the Lieutenant-Governor, pursuant to ch. 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

Then the Court intimates the opinion so expressed rendered it unnecessary to answer the second question, which rather looked to future legislation, and declined to answer further the remaining hypothetical questions submitted.

In order to estimate properly the effect of the expression "treated as a whole" in the above opinion we must look at the remaining sections of the said Act.

Section 2 deals with political meetings, tippling, brawling, etc.; sec. 3 with games and amusements; sec. 4 with hunting; sec. 5 with fishing; sec. 6 with bathing in exposed situation, and each of these things if done on Sunday is declared to be unlawful.

Sections 7 and 8 prohibit steamboat and railway excursions for hire, and the running of street cars on Sunday.

Condensing them thus each offence may not be accurately described, but I think they are sufficiently so to shew the nature of the Act when I add that there were penal clauses and prosecutions therefor provided in the Act.

The recovery of these penalties before a justice of the peace was provided for and he, so far as the Act could, was enabled thereby to direct a warrant to levy on the goods of the offender and in default of realizing the penalty and costs to imprison for a term not exceeding three months.

When we compare the sweepingly comprehensive language first quoted of the Quebec statute with this, wherein lies the difference?

There is a greater multiplicity of words in the Ontario Act than in the other. But when condensed each reaches to almost every activity of mankind in their daily avocations. The specific things in the Ontario Act not embraced in this comprehensive language used in the Quebec Act are comparatively unimportant as a test relative to criminal legislation by which to distinguish the one act from the other.

So comprehensive is the language in question here that it runs athwart the courses of business and transactions of men which they are only enabled to do by virtue of Dominion legislation. Counsel for respondent says that is not intended. But the Act discriminates not and covers the case of the banker and the railway manager or superintendent and all under him or them, as well as the case of the corner grocer or village blacksmith.

The Quebec farmer or professional man might work and possibly escape the operation of the Quebec Act whilst the Ontario Act leaves less chance of such escape from its drag net.

But in that what can enable us to distinguish between them? And so distinguish as to say the ruling does not bind us? I confess I cannot see my way clear to do so.

The argument for a power of delegation from the Dominion Parliament may be good or bad. I need express no opinion for I fail to see the existence of any delegation in regard to this legislation now in question. Nor do I find anything by way of reference that can constitute its adoption by Parliament directly or indirectly. All I do find is that exceptions to be presumed by us here as quite proper exceptions are made in the Lord's Day Act, R.S.C. ch. 153, by secs. 5, 7 and 8, which cannot help here where that Act, by consent of the parties, is in its direct operative effect excluded from our consideration. Admittedly there exists no consent of the Attorney-General to this prosecution.

In sec. 16 of that Act there is said to be something to get round all this.

That section in its first part guards against being held to repeal provincial legislation then existing. It is said that this proper exception in order to prevent vexatious meddling is a something that creates. I cannot think so. Nor do I think the second part of the section declaring that an offender against the Act who is on the facts violating "any other Act or law" may be prosecuted under either helps.

It is to be observed that this obviously presupposes "the Act

or law" to be a law and not a nullity. Each Act is intended by this section to be independent of any other.

In touching such a complex subject as this has become by the mass of legislation and judicial decision bearing upon it, this section is eminently proper for the purpose it was framed. That was to avoid friction and confusion.

I would not hold any man liable to prosecution on any provincial legislation resting solely upon this language of said sec. 16 to give it a vitality it did not carry in its own language when resting on the powers of the legislature of the province enacting it.

So far as these prosecutions rest on the comprehensive legislation in the first part of the section consisting of the two members thereof covering trade or business, and which I have dealt with, I think they should be prohibited.

But is there not presented in same section another offence of giving or organizing theatrical performances for gain which is something severable as the disjunctive "or" indicates, and entirely different on its face and gives rise to entirely different considerations from those applicable to the preceding parts I have just disposed of?

I do not know what conceivable cases of necessity or urgency can exist in relation to running a theatre on Sunday. I will assume that exception relates only to the cases falling under the part of the section with which I have dealt. But I cannot help remarking as I pass that the existence of this exception debars us from being able to make of the whole section one enactment prohibiting work or business only when relative to giving on Sunday theatrical performances or excursions where intoxicating liquors are sold and helps me to so sever these two prohibitions from the rest of the Act and permit of them being considered on their several legal merits.

I think the giving on Sunday of theatrical performances or excursions of the kind described may well be prohibited by provincial legislation. The prohibition of such a specific act as either might well find a precedent in the many cases recognizing

the right of a province to make such mere police regulations as the social habits and conditions existing in that province may require.

It is said by counsel for appellant that these precedents rest upon the licensing power, but I do not think the principles observed in reaching the conclusion rested there in all of them.

I do not propose analyzing the cases in detail but select as utterly free from this suggestion of dependence on the licensing power the case of *Regina v. Wason*, 17 O.A.R. 221, and Cartwright's Cases on the British North America Act, p. 578, when the Court of Appeal for Ontario, then composed of Chief Justice Hagarty, Mr. Justice Burton, later Chief Justice of the same Court, Mr. Justice Osler and Mr. Justice Maclellan, later and till recently a member of this Court, upheld legislation prohibiting the knowingly and wilfully selling to a cheese or butter manufactory milk diluted with water, or adulterated, or from which the cream had been taken, without notifying the owner or manager of the factory, and subjecting the offender to a penalty.

I had previous to the legislation thus enacted and passed upon, formed the opinion it was competent for a provincial Legislature to pass it. I see no reasons to change the opinion I then formed.

The decision is of course not binding upon us but the principles upon which that Court proceeded seem to me sound and the relation of the subject to then existing Federal legislation gives it a peculiar aptness to be considered in this case.

The reported argument of Mr. Blake in appeal as well as the reasons of the several Judges in giving judgment are certainly instructive if not binding.

The case of *Hodge v. The Queen*, 9 A.C. 117, shews the regulation there in question dealt with a prohibition against playing billiards in a licensed hotel on Sunday.

But though as suggested by appellant's counsel that arose out of the licensing power or regulation we are only carried back a step further for the licensing power itself was, by subsec. 9 of sec. 92, only for the raising of revenue.

Another and a broader reason lies at the foundation of this and all the other decisions upholding the power of regulation and prohibition of the liquor selling business.

The powers assigned by sub-secs. 8, 13 and 16, as well as sub-sec. 9, have in turn had to be relied upon.

The preventing of playing billiards in a licensed hotel on Sunday does not seem very closely related to the licensing power. The decision in that regard rather shews that circumstances or conditions may arise which render it a proper thing for the consideration by a local legislature and foundation for doing something to eradicate an evil which is not likely to be dealt with by Parliament.

I should pause before saying it was powerless to do so for I can conceive a legislature of a province being confronted with conditions which it alone would be likely to deal with and which the ordinary scope of the criminal law would not reach.

A great deal of our municipal legislation is and must, as our cities grow, be still more of this character:

True this is not a municipal regulation, but suppose the legislature chose to assign the power to city municipalities to make such regulation respecting theatrical exhibitions as that here in question, can it be said it would then be legislating *ultra vires*?

We at least in *Montreal v. Beauvais*, 42 Can. S.C.R. 211, have gone quite as far in upholding a by-law enacted by the legislature for closing shops after certain hours. That was for a closing of shops and rested upon the powers given by the subsections to which I have referred, and this is for a closing of a house of another kind for a whole day. I may add that leave to appeal from our decision in that case was refused by the Judicial Committee.

Each was no doubt intended to promote by such police regulations the health and moral well-being of the people.

Neither is necessarily within the criminal law.

The remarks of Lord Davey in *Toronto v. Virgo*, [1896] A.C. 88, at p. 93, point in the direction of what I am trying to reach in that regard.

And this now in question being I think of the character I have referred to as being within the power of the legislature I do not think it should be held null because of the constitutionally evil company it is found in.

The latter circumstance of course makes its maintenance more difficult. And though I am unable to see how any of the Act can rest directly upon the Federal legislation pointed to, it is clear that the circumstance of Parliament desiring to maintain local legislation of such a character is not against the maintenance of its validity.

In the view I have taken it is almost needless to add it is not a well-drawn Act, or at least not as effective as one might now be made if the draughtsmen were set to work with the present state of the Federal legislation, or the licensing power and its consequent power of regulation might be resorted to.

What can be done thus indirectly I submit may be upheld when done directly.

I think the prohibition should not extend to a charge properly confined to the prohibition of any theatrical representation on Sunday for gain. It seems severable from the *ultra vires* part of the Act.

The appeal should therefore be allowed in part and that being a divided success should carry no costs.

DUFF, J.:—The Quebec statute which is impeached on this appeal professes to create offences which, in my opinion, if validly created, would be offences against the criminal law within the meaning of sec. 91, sub-sec. 27, of the British North America Act, 1867. The enactment appears to me in effect to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such. Such an enactment we are, in my opinion, bound to hold, on the authority of the *Attorney-General for Ontario v. The Hamilton Street Ry. Co.*, [1903] A.C. 524, to be an enactment dealing with the subject of the criminal law.

It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct

of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament; but it may be noted that since the decision of the Judicial Committee in *Hodge v. The Queen* (9 App. Cas. 117), it has never been doubted that the Sunday closing provisions in force in most of the provinces affecting what is commonly called the "Liquor Trade" were entirely within the competence of the provinces to enact, and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-sec. 15 of sec. 92 of the British North America Act, 1867.

The view above expressed makes it impossible, I think, to hold that the statute in question can derive any efficacy from the Lord's Day Act, R.S.C. 1906, ch. 153. This latter enactment appears to be founded upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and, by the express provisions of the Act, such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactment of the British North America Act, 1867, already referred to. We should, I think, be going beyond what is justified by the guarded language of the Dominion statute if we were to construe it as giving validity to such legislation.

ANGLIN, J.:—The question to be determined on this appeal is the constitutionality of the prohibitive provisions of the

Quebec statute, 7 Ed. VII. ch. 42, as amended by the statute 9 Ed. VII. ch. 51.

The validity of this legislation is supported by the respondents on two different grounds: (a) that it is within the legislative jurisdiction conferred upon the provinces by the British North America Act; (b) that, if otherwise unconstitutional, it has been validated by certain provisions of the Federal Lord's Day Act, ch. 27 of the Dominion statutes of 1906.

(a) I am unable to find any real distinction between the Quebec legislation now under consideration and that of the Province of Ontario held to be *ultra vires* by the Judicial Committee in the *Hamilton Street Ry. Case*, [1903] A.C. 524.

The history of the Quebec legislation is no doubt different from that of the Ontario Act. The pre-confederation legislation of Quebec (Con. Stat. L.C. 1860, ch. 23) was much narrower in its scope than the ante-confederation statute in force in Ontario (C.S.U.C. 1859, ch. 104). But, whatever might be said of an Act of a provincial legislature similar to the earlier Lower Canada legislation, the Quebec statute now before us, because indistinguishable in substance and principle from the Ontario legislation condemned by the Privy Council, must be held by us to be *ultra vires* as an invasion of the domain of criminal law assigned by the British North America Act to the legislative jurisdiction of the Parliament of Canada.

Although enacted by a provincial legislature not empowered to deal with criminal law, the Ontario legislation was, in the view of the Privy Council, so distinctly criminal in its character that it could not be upheld as an exercise of provincial jurisdiction under any of the powers conferred by sec. 92 of the British North America Act, notwithstanding the cogency of the presumption that a legislature always means to set within its jurisdiction. I do not regard the decision of the Judicial Committee as depending on the fact that the Upper Canada Lord's Day Act (C.S.U.C. ch. 104) had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument which involves the view that legis-

lation held to be criminal in one province of Canada may be regarded as something different in another province, or that the phrase "the criminal law" used in sec. 91, sub-sec. 27, of the Imperial British North America Act may have a meaning different from that which would be attached to it in other legislation of the Imperial Parliament. Lord Chancellor Halsbury says that it is "the criminal law in its widest sense that is reserved" to the Dominion Parliament.

In the criminal law of England in 1867 was embraced the Sunday Observance Act, 29 Car. II. ch. 7, and other restrictive legislation: 13 Encyc. Laws of Eng., p. 707. Indeed a person who kept open shop on Sunday would appear to have been indictable at common law as "a common Sabbath-breaker and profaner of the Lord's Day commonly called Sunday": 2 Chitty's Criminal Law (2nd ed.), p. 20. Legislation of a prohibitive character, to infractions of which punitive sanctions are attached, passed for the purpose of preventing profanation of the Sabbath, would therefore appear to be within the purview of sub-sec. 27 of sec. 91 of the Imperial British North America Act, conferring on the Dominion Parliament exclusive jurisdiction to legislate in respect to "the criminal law."

I abstain, however, from attempting to enunciate a criterion for the determination of the broader question when a prohibitive enactment, carrying penal sanctions for its infraction, should be regarded as so far partaking of the nature of criminal law that it is within the exclusive legislative power of the Federal Parliament. I rest my opinion in the present case chiefly upon the judgment of the Judicial Committee already adverted to.

It was suggested at bar that the Quebec statute might be defended as legislation merely affecting civil rights, or as legislation in the nature of a local or municipal police regulation, with sanctions, authorized by clause 15 of sec. 92 of the British North America Act, appropriate to ensure obedience to its prohibitions. But the very first section indicates unmistakably that the purpose of the legislation is to make what the legislature deemed suitable provision "respecting the observance of

Sunday" in the province. To carry out this purpose we find in the second section a prohibition couched in wide and sweeping terms. Sec. 6 further confirms this view of the character of the statute, making it still more apparent that to prevent profanation of the Sabbath is its object. It is such legislation that their Lordships of the Judicial Committee, as I understand their judgment, have held to be criminal law and as such beyond the competency of a provincial legislature.

I do not refer to the fact that the informations in this case each charge more than one offence further than to say that any objection on that ground was waived. Counsel for both parties asked our decision upon the validity of sec. 2 of the Quebec statute as a whole and of the subsequent sections providing sanctions for infractions of sec. 2. I do not attempt to distinguish between the several matters and things forbidden by sec. 2. Forming part of an Act of which the purpose was to prevent profanation of the Sunday, each of the prohibitions must, I think, under the decision in the Hamilton Street Ry. case, be regarded as criminal legislation.

(b) The Dominion Lord's Day Act excepts from the operation of its prohibitive clauses everything which is, by provincial legislation, past or future, declared to be lawful. While reserving to or conferring upon provincial legislatures the power to make exceptions from the operation of the Dominion statute—and thus in effect *pro tanto* to amend it—and recognizing and maintaining in force, if not validating, provincial legislation already passed declaring certain acts to be lawful on Sunday (provisions made, no doubt, to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy), there is not a word in the federal statute confirming or authorizing anything in the nature of provincial prohibitive legislation past or future. On the contrary, sec. 14 declares that

Nothing in this Act shall be construed to . . . in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any Province of Canada when the Act comes into force.

The provincial legislation, in so far as it is prohibitive, must, therefore, depend for its force and efficacy upon the powers of the legislature which enacted it. In so far as it provides for the exception of acts and things which would otherwise fall under the prohibition of secs. 2, 5 and 6 of the Federal Act (sub-secs. 5, 7 and 8, R.S.C. 1906, ch. 153), Parliament has made that Act inoperative. But beyond these saving exceptions the Dominion statute does not "in any way affect" provincial legislation.

In this view it is unnecessary to consider the question debated at bar as to the power of the Dominion Parliament to delegate its legislative functions to a provincial legislature.

The latter part of sec. 1 of the Quebec statute may be within the saving provisions of the Federal Act; but the prohibitive clauses of the Quebec statute are, I think, *ultra vires* of a provincial legislature.

The appeal should, in my opinion, be allowed.

BRODEUR, J. (dissenting):—We have to decide whether the Act of the Legislature of the Province of Quebec respecting the observance of Sunday, 7 Edw. VII. ch. 42, is constitutional.

The present case related in the first instance to the closing of theatres on Sunday; but a consent which is in the record shews that this is a test case and that by common accord the legality of the whole statute itself is submitted to the decision of the Courts. These are the exact terms of the consent:—

The parties in this action consent to limit their argument and their pretensions to the single question whether the law respecting the observance of Sunday passed by the Legislature of Quebec in virtue of the statute 7 Edw. VII. ch. 42, of 1907, is constitutional, *ultra vires* or *intra vires*, and the grounds of prohibition are not to be discussed, the whole to avoid costs and loss of time.

The same arrangement is agreed on for the other actions of Sharpe, Richardson and Applegath.

To understand properly the purpose of this legislation it is important, I think, to know the circumstances which give rise to it.

The Province of Ontario had among its statutes a Sunday law based on the Statute of Charles II. It was entitled "An

Act to prevent the profanation of the Lord's Day." Passed under the Union of Upper and Lower Canada, it was reproduced in the Revised Statutes of Ontario and later it was thought fit to extend its provisions by prohibiting the running of street cars on Sunday. The Courts were seized of the question, and the Privy Council in the case of *Hamilton Street Railway v. The Attorney-General for Ontario*, [1903] A.C. p. 524, decided in effect that this provincial legislation was criminal in its nature and was as a whole unconstitutional. The Federal Parliament was then asked to legislate on the subject. The Government thought fit before adopting general legislation to refer the matter to this Court, and to this end certain questions were submitted, to which replies were given. It is quite evident from the nature of the replies that the Federal Parliament could not get out of the obligation to act. But it remained for it to decide what form it would give to its legislation. It might proceed under the provisions of the British North America Act (sub-section 27 of article 91) to declare criminal every act of service or every act of commerce and its authority could not have been contested. But it found itself confronted with laws existing for centuries in certain Provinces. It had to face secular customs which by their character contributed to the sanctification of Sunday or to the growth of religious feeling in the people, or which had been rendered necessary in consequence of the widely scattered settlements. I might cite among other customs the pilgrimages which from time immemorial have taken place on Sunday in the Province of Quebec. It is the same in regard to the peasants' custom of bringing the first fruits of his produce to church and having them sold at public auction after divine service, in order to consecrate the product to the support of religious works.

A law adopted by the Federal Parliament which would have declared any excursion on Sunday criminal, or which would have prohibited the sale of produce on that day, would naturally have struck at these very commendable customs.

In the face of these difficulties Parliament did not proceed to amend the Criminal Code, but it passed a law which by its

title, "An Act concerning the Observance of Sunday" and by its provisions in general, should be classed among those adopted for the peace, order and good government of the country under the dispositions of the first paragraph of section 91, which reads as follows:—

It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

This Sunday observance law adopted by the Federal Parliament is chapter 153 of the Revised Statutes of Canada, 1906.

Upon examining it we find that Parliament, far from wishing to encroach upon provincial rights, has, on the contrary, expressly recognized them by declaring in sections 5, 7, 8 and 16 that its provisions would only take effect if the Provinces have no law covering the case.

Sunday legislation strikes at civil rights, which as we know are within the scope of the Provinces, and there is no reason for surprise in seeing the Federal Parliament respect provincial autonomy in this regard.

In our laws and in our jurisprudence we have the question of temperance which may serve as a guide in the interpretation of the Federal and Provincial law regarding Sunday. The Federal Parliament, as we know, passed the Canada Temperance Act, which provided for the prohibition of liquor in certain districts. This law was attacked and the Privy Council in 1882, in the case of *Russell v. The Queen*, 7 A.C. p. 829, decided that the Federal Parliament, in virtue of its powers to make laws for the peace and good order of Canada, could pass this Act. It is a law tending to restrain the abuse of intoxicating liquors. The Provinces had also legislated on the subject and had ordered, for instance, the closing of bars on Sundays or during certain hours on week days. These provincial laws were also attacked as unconstitutional and the Privy Council on different occasions maintained their validity: *Hodge v. The Queen*, (1883), 9 A.C. p. 117; *Attorney-General of Ontario v. Attorney-*

General of Canada, [1896] A.C. p. 348; *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. p. 73; *Poulin v. Corporation of Quebec* (1883), 9 Can. S.C.R. p. 185; *Huson v. South Norwich*, 24 Can. S.C.R. p. 145.

In the second of these cases their Lordships say at page 365:—

In section 92, No. 16, appears to them (their Lordships) to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada so far as supplementary of the enumerated subjects fulfils in section 91.

In the case of *Russell v. The Queen*, 7 A.C. 829, the Privy Council also declared that under its powers to legislate for peace and good order the Federal Parliament had a right to pass a law prohibiting the use of liquors. The Provinces have also power to exercise the same authority.

If the Provinces can close the bars on Sunday I cannot understand why under the exercise of their powers to make police laws they would not have the right to shut theatres on Sunday.

The provincial legislation in question in this case after all only amounts to a police regulation. Moreover, this prohibition of theatrical representations on Sunday only occurs incidentally in the statute. This latter has for its principal purpose to clothe with authority of law the usages and customs of the Province of Quebec.

The first section of this statute is as follows:—

The laws of this Legislature, whether general or special, respecting the observance of Sunday and in force on the twenty-eighth day of February, 1907, shall continue in force until amended, replaced or repealed; and every person shall be and remain entitled to do on Sunday any act not forbidden by the Acts of this Legislature, in force on the said date, or, subject to the restrictions contained in this Act, to enjoy on Sunday all such liberties as are recognized by the customs of this Province.

It enumerates among these restrictions useless works of service, theatrical performances and excursions where liquor is sold, in enacting art. 2, which reads as follows:—

No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances or excursions.

It could not be pretended that these latter provisions render the whole law null and unconstitutional; and as I said at the outset, we are called upon to pronounce upon the validity of the whole Act itself in view of the consent signed by the parties at the trial.

We should, therefore, enquire what is the dominant idea of the law. For my own part, I find it in the first section, and the latter section was only enacted to prevent proprietors of theatres, persons organizing excursions, or those engaged in commerce or industry, from invoking such customs as might exist and which had been legalized by the first section.

Moreover, even supposing these prohibitions stood alone, I say they should be considered as police regulations falling under the jurisdiction of the Province.

Work on Sunday in the Province of Quebec has from the early days of the colony always been considered as a subject for regulation by the police authority. As we know the Intendant under French rule had the right to make police regulations. Criminal legislation, on the other hand, belonged to the *Conseil Souverain* or to the *Conseil Supérieur*. In accordance with this distribution of legislative powers the Intendant Raudot prohibited on May 25, 1709, every act of service on Sundays and holidays. We can find the text of this ordinance, as well as several others which he made for preventing noise in the vicinity of the churches, at pp. 421 and 426 of vol. 3 of "*Ordonnances des Gouverneurs et des Intendants sur la voirie et la police*," compiled in 1856.

The Federal Parliament by its law of 1906 did not wish to make criminal legislation. If it had wished to give this character to the legislation it would not have called it simply "An Act respecting the Lord's Day"; but adopting the terms of the Ontario statute which had just been considered by the Privy Council, it would have called it "An Act to prevent the profanation of the Lord's Day." It would have amended its Criminal Code. There already existed Part 22 of the Code, which relates to offences against religion. But in this law there is no question of the Criminal Code.

The act which is marked as criminal by the Legislature should apply to all the citizens of the same country. It seems strange that an act could be a crime in one part of the country and would not be so in another. Nevertheless, this would be the effect of the Federal statute which we are examining. Indeed in sections 5, 7, 8 and 16 certain things are prohibited provided that no Provincial law has been passed on the subject.

Thus, in one Province some certain kinds of work would be forbidden by the Federal law, while under the Provincial law it would be allowed in another Province.

If we consult section 6 of the Federal statute relating to telegraphers, we see in the same way that this statute cannot be criminal legislation because it has in view the creation of a day of rest.

It is quite evident to me that this Federal statute should not be considered as a criminal statute, but as a law relating to the peace and good order of the country.

Then all Provincial legislation which is not incompatible with the provisions of this statute is valid because it relates to civil rights and to matters of local interest and because its regulation of the subject partakes of the nature of police laws under the provisions of sub-sections 13 and 16 of art. 92 of the British North America Act.

The appellant has invoked in his favour the opinion given by the Supreme Court upon the reference made by the Governor-in-Council. The legislation which was subsequently adopted by the Federal Parliament and by the Provincial Legislature of Quebec shews, as I have just said, that neither in one Parliament nor the other was there a wish to enact criminal legislation. It seems, on the contrary, as if the Federal Parliament and the Provinces had come to an understanding to avoid the difficulty which had been pointed out by the Supreme Court.

For all these reasons I am of opinion to dismiss the appeal with costs.

Appeal allowed with costs.

[HIGH COURT OF JUSTICE, ONTARIO.]

THE DIVISIONAL COURT, MULOCK, C.J.E.D., SUTHERLAND, AND
MIDDLETON, JJ.

THE KING v. CLARKE.

1. INTOXICATING LIQUORS (§ III F—82)—“DISPOSAL” OF LIQUOR IN PROHIBITED HOURS—PREVIOUS SALE CONTRACT.

Where a bottle of whiskey was sold by a licensed tavern keeper, during the business hours allowed by the Liquor License Act, and was “laid away” in the kitchen attached to the licensed premises, for the purchaser, who called for it on a Sunday when sales and disposals of liquor are prohibited by the Act, the tavern keeper by then delivering it to the purchaser is guilty of an illegal “disposal” thereof.

[*Pletts v. Beattie*, [1896] 1 Q.B. 519, referred to.]

2. INTOXICATING LIQUORS (§ III A—56a)—WHAT IS A “DISPOSAL.”

The word “disposal” in sec. 54, of the Liquor License Act is used in a liberal sense and may or may not be associated with selling, and any transaction respecting the physical change of possession of whiskey is included under the term “disposal” and is prohibited by the Liquor License Act, if accomplished during forbidden hours, and particularly if resorted to for the purpose of defeating the purposes of the statute.

DECIDED: December 28, 1912.

APPEAL from the judgment of the Judge of the District Court of Algoma, dismissing an appeal from the decision of the Police Magistrate for the district, who acquitted the respondent from the charge of selling or disposing of liquor contrary to the provisions of sec. 54 of the Liquor License Act.

The appeal was allowed.

J. R. Cartwright, K.C., for the Crown.

The respondent was not represented by counsel.

MULOCK, C.J.:—The respondent, the keeper of a licensed tavern in the village of Ryderback, sold one Morrison a bottle of whiskey between the hours of six and seven p.m. on Saturday, the 13th day of April. The purchaser then paid for it, but did not remove the liquor, which “was laid away” for him by the respondent in his kitchen in the hotel. The next day (Sunday) the purchaser called for the liquor, when the respond-

ent took it from the kitchen and delivered it to him in the hotel hall.

Section 54 of the Liquor License Act is as follows: "In every place where intoxicating liquors are authorised to be sold, by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same to any person or persons whomsoever from or after the hour of seven of the clock on Saturday night to six of the clock on Monday, thereafter," etc.

The next question here to determine is whether the act of the respondent in handing to the purchaser the bottle of whiskey in question in the hall of the hotel on Sunday was "a sale or other disposal" within the meaning of this section.

The sale was completed on the Saturday, and for the purposes of this appeal it may be conceded that the property in the liquor then passed to the purchaser, although he did not obtain actual possession until the next day, Sunday. In the meantime the hotel keeper had the actual custody of the liquor. As said by Wills, J., in *Pletts v. Beattie*, [1896] 1 Q.B. 519, 523: "The provisions of the License Act were not framed with regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered."

The learned Judge has dealt with this case as if it turned upon the question of title to the liquor. The actual sale may have given the purchaser title to it, but the Act prohibits more than mere selling, and in view of this object a liberal construction should be placed on the words "or other disposal."

In my opinion, these words as here used are intended to include transactions respecting liquor whether or not connected with its sale. If the words were to be given the narrow construction contended for by the respondent, the object of the Act in seeking to suppress the traffic in liquor on Sunday could readily be defeated. Any person desiring to obtain liquor on Sunday could complete his purchase within lawful hours on Saturday, leaving the liquor then purchased in the hotel until

Sunday and then call and obtain it. The legislation in question does not, I think, contemplate a licensed hotel becoming a base for such operations, and I interpret them as covered by the prohibitory words "or other disposal." The word "disposal" is not here used in a strict technical, but in a liberal sense. According to the dictionaries it has many meanings; some of them associated with selling, others with the mere matter of possession. The following are some of the meanings given by the dictionaries: "An act disposing of something by gift, sale, conveyance, transfer, or the like; the act of putting away, getting rid of, settling or definitely dealing with; bestowing, giving, making over, alienation or parting with by sale or the like," etc.

The handing of the bottle of whiskey to the purchaser was a transfer of the actual possession of it and as such was, in my opinion, an act of disposal prohibited by the section.

I, therefore, think this appeal should be allowed with costs here and below, and the case should be referred back to the magistrate to be dealt with.

SUTHERLAND and MIDDLETON, JJ., concurred in allowing the appeal.

Appeal allowed.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE WETMORE, C.J., IN CHAMBERS.

THE KING v. HAZELWOOD.

1. HABEAS CORPUS (§ 1 B—7)—OTHER VALID COMMITMENT BAR TO DISCHARGE—REFUSAL OF WRIT.

Where it appears upon an application for a writ of habeas corpus made in respect of a summary conviction and commitment thereunder that the applicant is properly in custody under an order of remand in an entirely separate proceeding upon another charge, a writ of habeas corpus may be refused as, if issued, the prisoner's discharge could not be ordered in view of the other valid commitment; the proper course in such case is to attack the commitment upon the summary conviction by certiorari proceedings to quash the conviction and the warrant of commitment.

DECIDED: December 19, 1911.

APPLICATION on behalf of the accused for the issue of a writ of habeas corpus with a view to his discharge from custody under a warrant of commitment issued upon a summary conviction alleged to be irregular.

Sampson, for the prisoner.

WETMORE, C.J.:—This is an application on behalf of Joe Hazelwood, a prisoner confined in the common gaol at Regina, to shew cause why a writ of habeas corpus should not issue to have his body before a Judge with a view to his being discharged from custody, and also for a writ of certiorari to issue in aid of such application. This application was made by Mr. Sampson yesterday (Monday). On Saturday, however, his partner, Mr. Barr, applied at my Chambers for a summons in this matter, and he stated that Hazelwood was in custody under a commitment made on a preliminary examination against him for horse-stealing; and Mr. Barr then stated that that commitment was regular. As a matter of fact, I know myself that Hazelwood is in custody by virtue of such commitment and by virtue of a remand made by me at the Moose Jaw sittings lately held. Hazelwood came before me at that sittings and was charged with a number of offences of horse-stealing. The Crown not being ready to proceed, the trial was postponed; and in the meanwhile Hazelwood was remanded to prison by my order. Under such circumstances, it would be idle to grant this application for a writ of habeas corpus; for the return to any such writ of the imprisonment by virtue of commitment for horse-stealing and remand would be sufficient authority to justify the imprisonment and refuse the discharge.

I never heard of a discharge from custody being ordered where there is any sufficient authority to warrant the party's commitment to prison. If desired, I will direct a summons for a writ of certiorari to issue with a view of quashing the convic-

tion for improperly branding the stock horses as alleged, and to quash the warrant of imprisonment issued on such conviction. I am not, however, yet satisfied that the grounds upon which it is sought to quash this conviction are well taken. The conviction has not been brought before me, and I can very readily see why it has not. Some of the grounds stated in the proposed summons may be valid, but I would like to hear something further on that subject. Some of them are entirely imaginary: I see nothing in the material before me to warrant their being taken.

Habeas corpus refused.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE GREGORY, J.

THE KING v. CAMPBELL.

1. INTOXICATING LIQUORS (§ III A—55)—LIQUOR TAX LAW—CERTIORARI—SUFFICIENCY OF INFORMATION.

An information for selling liquor without a license authorizing such sale under the Liquor License Act, ch. 142, R.S.B.C. 1911, sec. 66, need not describe the offence in the exact words of the statute, if the defendant, from the form of the information, receives particulars of the charge such as he himself might ask for if the information had been in the words of the statute.

2. INTOXICATING LIQUORS (§ III A—55)—RETAIL LICENSEE SELLING IN QUANTITY IN EXCESS OF LICENSE LIMIT.

A licensed retail liquor dealer making a sale of liquor in a larger quantity upon a single sale than his license permits, is properly convicted under the Liquor License Act, R.S.B.C. 1911, ch. 142, of selling liquor without having first obtained a license authorizing him so to do.

3. CERTIORARI (§ II—24)—CONVICTION WITH SUPPORTING EVIDENCE—WEIGHT OF EVIDENCE NOT CONSIDERED.

Where there was some evidence before the magistrate to support his findings of fact such findings will not be reviewed in certiorari proceedings.

DECIDED: November 12, 1912.

MOTION to make absolute a rule nisi for a writ of certiorari to bring up and quash a conviction. The grounds urged are (1)

neither the information nor the conviction describe any offence known to the law; and (2) the evidence does not warrant a conviction.

The motion was discharged.

J. A. Aikman, for the appellant.

W. C. Moresby, contra.

GREGORY, J.:—As to the second objection, it is only necessary to say that there was some evidence on which the magistrate could make the finding he did, and this is not a proper method of attempting to review a magistrate's finding of fact, even if I disagreed with it. As to the first objection, it is urged that the Liquor License Act does not prohibit the offence alleged to have been committed. It certainly does not in the exact words in which it is described in the information, but I think it does nevertheless prohibit the offence committed, and for which Campbell has been convicted, which is, in short, selling liquor in a manner not authorized by his license. Sec. 22 of the Act authorizes the superintendent of provincial police to issue hotel licenses empowering the licensee to vend liquor by retail in quantities not exceeding one Imperial quart in any one act of vending. That is the license Campbell had, and the only license he could have had. Therefore he was only licensed to sell liquor in that way, for sec. 66 of the Act prohibits any person from vending in any manner whatsoever any liquor without having first obtained a license authorizing him so to do.

It seems to me that this section contains all the prohibition necessary, and that Campbell cannot complain because in the information he is furnished with the particulars which he, being a licensee, might reasonably ask for if proceeded against for selling liquor without a license. As a matter of fact, he had no license to sell liquor in the manner in which the magistrate has found he did, and he has been convicted of it, and I do not see how I can make the rule absolute herein. It will therefore be discharged.

Motion discharged.

[COURT OF KING'S BENCH, QUEBEC.]
(Appeal Side.)

BEFORE ARCHAMBEAULT, C.J., LAVERGNE, CARROLL, AND
GERVAIS, JJ.

THE KING v. McKEOWN.

1. VENUE (§ II B—20)—CRIMINAL CASE—INFORMATION IN ONE DISTRICT—
ARREST IN ANOTHER DISTRICT—TRIAL IN EITHER.

The Court of Sessions at Montreal has jurisdiction to try a charge for which the accused was arrested in Montreal and committed for trial there, although upon an information laid in another judicial district of the same province; it is not essential that the accused shall, on his arrest, be sent for trial to the local venue at which the information was laid.

DECIDED: November 30, 1912.

THIS was a petition for leave to appeal from a conviction for theft pronounced by the Court of Session at Montreal. The complaint was laid in Victoriaville but the accused was arrested in Montreal, and tried and convicted in Montreal. The accused contended that the Courts of the district of Montreal had no jurisdiction, that he should have been sent to Victoriaville for trial.

Jas. Crankshaw, jr., for the accused.

J. C. Walsh, K.C., for the Crown.

THE COURT was unanimous in the opinion that the Courts of the Montreal district had jurisdiction to try an accused arrested within their judicial district, that the accused had had a fair trial and could shew no prejudice.

[DISTRICT OF LETHBRIDGE, ALBERTA.]

BEFORE HIS HONOUR JUDGE WINTER, DISTRICT JUDGE.

THE KING v. CAMPEY.

1. FORCIBLE ENTRY (§ I—1)—CRIMINAL OFFENCE—ACTS OF VIOLENCE.

To constitute the offence of forcible entry upon land under Cr. Code secs. 102 and 103, the entry must have been made under some circumstances of actual violence or terror.

2. FORCIBLE ENTRY (§ I—1)—OFFICE PREMISES—LANDLORD'S RE-ENTRY.

A breach of the peace or apprehension thereof under Cr. Code sec. 102 is not to be anticipated as a natural sequence to a re-entry by breaking in made by landlords upon office premises overheld by their tenant effected at night when neither the tenant nor any of his employees was present, so as to constitute the offence of forcible entry.

DECIDED: November 7, 1910:

TRIAL without a jury under the speedy trials clauses of the Criminal Code of a charge of forcible entry under Cr. Code sec. 103.

C. F. P. Conybeare, K.C., for the Crown.

L. M. Johnstone, for defendant.

JUDGE WINTER:—The accused was indicted under the provisions of sec. 103 of the Criminal Code, 1906, in the following circumstances:—

A firm of real estate agents, Waddington & May, occupied as tenants an office forming part of a building in Round street in the city of Lethbridge, this office being entered by a separate door opening on the street and being separated from the rest of the main building by an internal partition. On Saturday, the 10th October, 1910, the tenants closed their office, leaving some maps on the walls and some furniture, intending, I infer, at some future time to return there. At the time of the occurrence detailed below they were in possession of the office in question, but were overholding tenants, having received notice to quit, which had expired, from their landlords. The accused, on the night in question, at a time when the office had been vacated by the tenants and their staff (there being no person at all in or about the office who in any way represented the tenants), and in the presence of a member of the police force of the city of Lethbridge (who was present at his invitation), broke down with a small axe several boards of the internal partition separating the office from the remainder of the building, which was occupied by the landlords or their other tenants. This partition was reached by the

accused by means of an inner door used by the landlords, which door could be arrived at only after entering one of the outer doors of the building, neither of such doors being used or enjoyed by the tenants as part of or as a means of access to the office in question. Having made an aperture in the partition, the accused thereby entered the office, and proceeded to block up the windows and door thereof so as effectively to prevent any one from entering the office from the outside. In so doing the accused was acting as agent for and under the instructions of the landlords. On the tenants arriving at the office on the following Monday, they found that they could not enter the office, and thereupon an information was sworn out by the tenants charging the accused with forcible entry. The accused, having been committed for trial and elected to be tried speedily, was tried before me on the 19th October, 1910.

In order to prevent violent and arbitrary acts to obtain possession of lands claimed by persons against others who might be in the peaceable possession of such lands, special Acts were passed in the reigns of Richard II., Henry VIII., Elizabeth, and James I., the earliest statute, of Richard II., still being, in England, that under which the charge in such cases generally is laid. It enacts as follows:—

That none from henceforth make any entry into any lands and tenements but in case where entry is given by law; and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner.

The plain object of the statute was that no one should with force and violence assert his title so as to disturb the public peace. The general proposition is that there must be violence, an array of numbers or threatening language, combined with circumstances of a sort and degree to create in those opposing an apprehension either of bodily harm or of a breach of the peace unless the demand for possession is yielded. This is the rule in some cases in which there is a person present to resist: 2 Bishop, Crim. Offences, sec. 505. The gist of the offence is not the making such an entry as would merely constitute a trespass,

and as such would not be an indictable matter, but in the entry being accompanied by such circumstances of violence or terror as would bring the person entering within the purview of sec. 103.

It seems clear that the entry ought to be accompanied by some circumstances of actual violence or terror, and, therefore, that an entry that has no other force than such as is implied by the law in every trespass whatsoever is not within these statutes: *Brundige v. Thompson*, 9 N.S.R. 356; *Bertram v. Bonham*, 12 N.S.R. 160; Hawk. P.O. 64, sec. 25. The accused appears to have carefully selected an hour at which his action was most unlikely "to cause a breach of the peace or reasonable apprehension thereof." By these terms and from the context, I conceive a breach of the peace or apprehension thereof as a present incident existing or occurring at the time of the entry, not something to result or to be apprehended in the future. In the absence of the tenants or of any one at all in the office, there was no one to interfere with the entry being made so as to cause a breach of the peace, nor was there any one who could be terrorized into giving possession by any display of force, had any such display been made. A breach of the peace has been defined as "a violation of public order or disturbing the public peace:" Bouvier, p. 262 (Rowles' ed.). So far as the public was concerned, there was no disturbance or breach of the peace to be apprehended, because the partition which was broken down was not abutting on a public highway, but was an internal partition, invisible, as I infer, to persons passing by on the highway or street. No disturbance did in fact occur. Even if the tenants had unexpectedly made their appearance on the scene at the time when the partition was being taken down, it does not follow that "a forcible entry" would have taken place. Probably it would not have. The landlords would have been within their rights if they had by their agents proceeded to take the entire partition down. It was their property, while, on the other hand, the tenants of the office were overholding tenants: *Jones v. Foley*, [1891] 1 Q.B. 730.

Moreover, in the matter of forcible entry, there is a distinction drawn between a man's dwelling-house and his warehouse.

This distinction has long been recognized in civil cases: see *Semayne's Case*, 1 Sm. L.C. 104, and observations of the Court in *Hodder v. Williams*, 2 Q.B. 663. But I wish clearly to guard against being considered as holding the view that a forcible entry cannot be made in respect of a man's office or warehouse. On the contrary, it can; but I have found no reported case which is an authority for holding that a forcible entry, within the meaning of the statute, can be made in respect of a vacant building, *i.e.*, one in which there is no one at all directly or indirectly representing the occupier, as was the case in the present instance. I find as a fact that the accused effected an entry into the premises claimed by the tenants as being in their occupation, but that such entry was effected without any circumstances of terror or violence which would constitute a forcible entry within the meaning of the Criminal Code. The accused is acquitted.

Defendant acquitted.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE BARKER, C.J., LANDRY, McLEOD, WHITE, BARRY AND
McKEOWN, JJ.

THE KING v. MATHESON; Ex parte HAID SHILALA.

1. INTOXICATING LIQUORS (§ III J—94)—SECOND AND SUBSEQUENT OFFENCES—FIRST CONVICTION UNDER ALIAS NAME.

The previous conviction necessary to support a summary conviction for a second offence and the more onerous punishment provided for second offences under the Liquor License Act, C.S.N.B. 1903, ch. 22, need not have described the accused by the same name as that under which he was summoned for the second offence; the second conviction will be regular in that respect if the evidence upon the trial for the second offence proves the identity of the person previously convicted with the person summoned for the second offence, although not present to defend the case.

2. INTOXICATING LIQUORS (§ III J—94)—SECOND AND SUBSEQUENT OFFENCES—ABSENCE AT TRIAL.

A defendant who has been duly summoned may be convicted in his absence upon a charge of a second offence under the Liquor License Act, C.S.N.B. 1903, ch. 22, notwithstanding that sec. 85 directs that

on the accused being found guilty of the subsequent offence he shall "then and not before be asked whether he was so previously convicted" and further specially provides the course of procedure: (a) if the accused answers admitting the fact; (b) if he denies or stands mute of malice, or (c) does not answer directly to such question.

[*R. v. Coote*, 17 Can. Cr. Cas. 211, 22 O.L.R. 269, approved; *Ex parte Groves*, 24 N.B.R. 57, applied.]

DECIDED: June 21, 1912.

MOTION to quash a summary conviction made by F. F. Matheson, police magistrate, against Haid Shilala, for a second offence against the Liquor License Act.

J. D. Phinney, K.C., in support of the order nisi.

Wm. Murray, contra.

The judgment of the Court was now delivered by

BARRY, J.:—The applicant, by the name of Haid Petros, was, on the 17th of May last, convicted before Francis F. Matheson, Esquire, police magistrate in and for the town of Campbellton, for having, on the 11th of May last, at the town of Campbellton, unlawfully sold liquor, without the license therefor by law required (that is, by the Liquor License Act, ch. 22, C. S. 1903), and, such conviction being for a second offence, was sentenced to imprisonment in the common gaol of the county of Restigouche, for the term of four calendar months.

On the 25th of May, Landry, J., granted an order absolute for a *certiorari*, with an order *nisi* to quash the conviction, upon the following grounds:—

(1) The magistrate had no jurisdiction to convict, inasmuch as the defendant was never summoned to appear in Court, the summons not designating him by name.

(2) No jurisdiction in magistrate to convict for a second offence in the absence of the accused, no one appearing for him, the accused.

(3) No evidence of previous conviction against the accused. In the affidavit produced before Mr. Justice Landry on the

application for the rule, the defendant, therein calling himself Haid Shilala, swears that "his name is Shilala, and his surnames are Haid, Petros, and Nahea"; and he admits that under the name of Haid Petros, he was, on the 17th of May, convicted before the police magistrate of Campbellton for unlawfully selling liquor as charged, and that he verily believes that he is the man who is designated in the conviction and the commitment issued thereon, as Haid Petros. A surname is a name added to a Christian or baptismal name to make it more specific; hence, since such names often become family names, a family name—Stand. Dic.; surname means the family name; the name over and above the Christian name—Ency. Lond.; the part of a name which is not given in baptism; the last name; the name common to all members of a family—Whar. Law Dic.

In this view of these generally accepted meanings and definitions of the word surname, it is not clear to me just what the defendant means by his affidavit. Does he mean that "Shilala" is his Christian or baptismal name? If so, since the Christian name usually precedes the surname, his name should be written Shilala Haid and not Haid Shilala. Or, if, as would seem to be the case from the way in which he signs his name, Shilala is a family name or surname, then, according to his own statement, he has four surnames, but no baptismal or Christian name, and in the absence of any such, uses one of his surnames "Haid" as a baptismal name. Accepting his affidavit at its face value, it would seem to be quite as correct to designate him by the name of "Haid Petros" (two surnames) as it would be to designate him by the name of "Haid Shilala," which he now calls himself, and which also is made up of two surnames. I am rather inclined to think that the true conclusion to be drawn from the affidavit is that the contention there set up, that his name is not Haid Petros, is but a clumsy subterfuge, resorted to by the defendant for the purpose of avoiding the just consequences of his unlawful act.

That Haid Shilala and Haid Petros are the names of one

and the same person appears to be quite clear; and that that person was, on the thirtieth of January last, summoned by and under the name of Haid Petros to answer to a charge of a first violation of the Liquor License Act; that he appeared and pleaded guilty to the charge, was convicted and fined \$50, and paid the fine. That by and under the same name, he has been assessed as one of the ratepayers of the town of Campbellton for the years 1910 and 1911, and paid the rates so assessed against him, also appears from the affidavits read before us in shewing cause against the rule. In the certificate of the previous conviction put in evidence upon the trial of the second offence, the police magistrate certifies that the person convicted of the first offence is the same person who was charged and summoned for the second offence.

The accused was duly summoned in ample time to have appeared and defended the charge; the officer who served the summons acquainted him of the time at which he was required to appear. I think he was properly charged and summoned, and that he was, and must have known that he was, the person intended, and that he cannot now get rid of the conviction by saying that his name is Haid Shilala. Upon the trial of the second offence, of which the defendant was convicted, he did not appear either in person or by counsel, and the conviction complained of was made against him in his absence.

The prosecution was brought under the Liquor License Act, ch. 22, Con. Stat. 1903, the 85th section of which provides that

The proceedings upon any information for committing an offence against any of the provisions of this chapter in case of a previous conviction or convictions being charged, shall be as follows:—(a) The justices or police magistrate shall, in the first instance, inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be sentenced accordingly; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question, the justice or police magistrate shall then enquire concerning such previous conviction or convictions.

The contention here is that unless the accused be present, to be asked whether or not he has been previously convicted, he

cannot, upon a proper construction of the statute, be convicted of a subsequent offence under the Act. The third schedule of the Act contains forms for describing numerous offences under the Act, besides a general form of information for a first offence. Succeeding schedules contain, besides a form of information for second, third and fourth offences, forms of conviction, commitment, and declaration of forfeiture. These forms are, by the 87th section of the Act, declared to be sufficient in the case thereby respectively provided for, but where no forms are prescribed by the schedules, new ones may be framed according to those appended to the Criminal Code, 1892, of the Statutes of Canada, and thereby made applicable to summary convictions before justices of the peace, or any Acts amending the same respectively, such forms being made short and concise in the mode indicated in the schedules in the Liquor License Act, which shall serve as guides as far as the particular case will allow.

The general law applicable for the purpose of recovering any fine, or enforcing any order, penalty or imprisonment imposed by virtue of any Act of the Legislature of this province is the Summary Convictions Act, ch. 123, Con. Stat. 1903. So that, excepting in so far as the provisions of the Summary Convictions Act are changed by the Liquor License Act, all the provisions of the former are made applicable to prosecutions under the latter Act. Particular and specific forms are, as I have mentioned, prescribed by the Liquor License Act, and in case no form there prescribed is found to meet a particular case, recourse is to be had to those appended to the Criminal Code of Canada; but it is to be observed that none of the other provisions, except the forms of the Criminal Code, are incorporated in the provincial Act. In this respect it differs from the Ontario Liquor License Act, which I shall have occasion presently to mention, by which offences in violation of that Act are to be prosecuted in a summary manner according to the provisions and after the forms in the Dominion Act relating to summary convictions, which is made to apply to all prosecutions and proceedings so far as consistent with such Liquor License Act.

Under the New Brunswick Summary Convictions Act, a defendant may be convicted in his absence. The magistrate need not, it is true, proceed in the absence of the defendant; he may, upon proof of the proper service of a summons in a reasonable time, issue a warrant and have the defendant brought before him. But when a summons has been issued and served in a reasonable time, and the defendant fails to appeal in obedience thereto, the justice may proceed to the hearing of the information or complaint, and adjudicate thereon as if such party had appeared to the summons and denied the truth of the information (section 8).

In the Canada Temperance Act, 1878 (41 Vict. ch. 16), there was, and still is, with some changes subsequently introduced, a section, section 122 (afterwards R.S.C. 1886, ch. 106, sec. 115; now R.S.C. 1906, ch. 152, sec. 143), containing provisions substantially the same as those in section 85 of the Liquor License Act of this province; *i.e.*, that in case of a previous conviction being charged, the justice or magistrate or other officer shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be convicted of the second offence; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question, inquiry may then be made concerning the previous conviction.

Section 107 of the Canada Temperance Act, as originally passed, provided that offences against the second part of the Act, might be prosecuted (and by amendment, the penalties and punishments therefor enforced), in the manner directed by the "Act respecting the duties of justices of the peace out of sessions in relation to summary convictions and orders," or as it has since come to be called the Summary Convictions Act (now Part XV. of the Criminal Code), so far as no provision was thereby made for any matter or thing which was required to be done with respect to such prosecution.

The 7th section of the Summary Convictions Act (Dom.), 32 & 33 Vict. ch. 31 (afterwards R.S.C. 1886, ch. 178, sec. 39; now R.S.C. 1906, ch. 146, sec. 718), provided that on proof that the summons had been served a reasonable time before the time for appearance, the justice might proceed *ex parte* to the hearing of the information or complaint, and adjudicate thereon as fully and effectually to all intents and purposes as if the party had personally appeared before him in obedience to the summons.

These two apparently conflicting provisions of the Canada Temperance Act have been the subject of various and conflicting decisions of Canadian Courts. In *The Queen v. Salter*, 20 N.S.R. 206, which arose under the Canada Temperance Act, 1878, the Supreme Court of Nova Scotia held that section 22, subsection 1, of that Act was imperative, and that the magistrate had exceeded his jurisdiction in making the conviction in the absence of the defendant, and that the conviction must, therefore, be set aside. This case was followed in *The Queen v. Porter*, 20 N.S.R. 352, in the same Court. On the other hand it was held in *Reg. v. Wallace*, 4 O.R. 127, a case involving the construction of the same two sections, that the omission of the magistrate to ask the accused if he had been previously convicted, does not take away the magistrate's jurisdiction to inquire into such prior conviction. In *Reg. v. Brown*, 16 O.R. 41, it was held that the provisions of section 115 of the then Act (that is, section 122, C.T. Act, 1878), were directory only; while the contrary view was expressed in *Reg. v. Edgar*, 15 O.R. 142.

The question arose and was determined in our own Court in *Ex parte Groves*, 24 N.B.R. 57, where a majority of the Court held that a defendant may be convicted of a second offence under the Act, though he is not present at the trial to be asked as to a previous conviction.

Substantially the same question that we are now called upon to determine recently arose in Ontario. The defendant was charged with a second offence against the Liquor License Act of that province, and was, in his absence, though duly summoned,

convicted thereof before a magistrate, and sentenced to be imprisoned. Section 101 of the Act, as found in R.S.O. 1897, ch. 245, provides that in such a case the magistrate shall, in the first instance, enquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then and not before be asked whether he was so previously convicted; but if he denies or does not answer, the magistrate shall then enquire concerning the previous conviction. The words "and not before" were struck out of the Ontario statute by an amending Act, 9 Edw. VII. ch. 82, sec. 20.

By sec. 178 of the Criminal Code, as previously mentioned, when the defendant has been duly summoned, if he fails to appear, the magistrate may proceed with the trial *ex parte*, or may issue his warrant, and adjourn the trial until the defendant is apprehended. Section 721 provides that if the defendant is personally present, he shall be asked to plead. These two sections are by the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, section 2, made applicable to offences against Ontario statutes, unless in any Act thereafter passed it is otherwise declared. It was held by the Court of Appeal, *R. v. Coote*, 17 Can. Cr. Cas. 211, 22 O.L.R. 269, reversing the order of Middleton, J., who had discharged the defendant upon *habeas corpus*, that the magistrate had jurisdiction to convict the defendant in his absence, and that the two provisions were neither repugnant nor inconsistent, and should be read together. Meredith, J.A., also held that since the amendment striking out the words "and not before," the provision of section 101 as to asking the defendant whether he was previously convicted, must be regarded as directory only; while Magee, J.A., in the course of an exhaustive judgment in which he enters upon a history of the temperance legislation in both the Ontario and the Dominion statutes, and a review of the authorities in the Ontario, Nova Scotia and New Brunswick Courts, thinks the provision peremptory; but, with some doubt, holds that the section may be construed in connection with other sections, so as to authorize proceedings in the

defendant's absence, if he chooses to absent himself altogether. Notwithstanding the difference in the sources from which the Ontario and New Brunswick statutes take their procedure, they are in the main similar, so that the decision of the Ontario Court in the case just quoted, while not binding upon us, is of value as being the opinion of a strong Court upon the very question that we are now called upon to determine. And the provisions of the Canada Temperance Act taken in conjunction with the procedure there provided for the enforcement of the penalties imposed by the Act, approach so nearly to being identical with the provisions of the Liquor License Act, and the procedure provided for the enforcement of its penalties by our own Summary Convictions Act, as to make the decision of this Court in *Ex parte Groves*, 24 N.B.R. 57, which went upon the Dominion statutes, a direct authority for holding that for a second offence under the Liquor License Act, a defendant may be convicted in his absence. So much has already been said in explanation of the construction adopted in the last two mentioned cases, that no useful purpose would be served by a further reference to or discussion of the reasons assigned by the Courts for the conclusions arrived at in those cases.

The third ground of objection is really involved in the first, and turns upon the question whether the person convicted of the subsequent offence is the same person who was convicted of the first, and I think there can be no doubt whatever but that he was. The order *nisi* to quash will be discharged, and conviction affirmed.

Conviction affirmed.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE MACDONALD, C.J.A., AND IRVING AND GALLIHER, JJ.A.

THE KING v. THURSTAN.

1. GRAND JURY (§ I—2)—CONDUCT OF PROCEEDINGS—REMITTING BILL IRREGULARLY FOUND.

Where a grand jury improperly brought in a true bill without calling any witnesses merely upon perusal of the depositions taken at the preliminary enquiry before a magistrate, and such fact is brought to the notice of the court by the omission to initial the names of any witnesses whose names were endorsed on the bill of indictment, the court has a discretionary power to remit the case to the same grand jury to find on the bill on proper evidence only, and the grand jury is not necessarily disqualified from acting because of having read and considered the depositions.

DECIDED: June 6, 1911.*

CASE STATED for the opinion of the Court of Appeal by Murphy, J., as follows:—

(1) Upon the grand jury returning a true bill and after their having left the Court room, but before being discharged, I noticed that none of the witnesses' names had been initialled by the foreman of the grand jury on the indictment. I thereupon sent for the said grand jury and pointed out to them that no names had been initialled upon the indictment, and thereupon the foreman of the grand jury in open Court stated that no witnesses had been called and that a true bill had been found by examination of the depositions taken at the preliminary hearing. I thereupon returned the indictment so indorsed to the foreman of the grand jury, informing them that a bill so found could not be acted upon, and instructed them to again retire and take evidence, and determine by such evidence whether or not they would bring in a true bill, whereupon the grand jury did retire and later returned a true bill. Upon the prisoner being called to plead, and before his plea was entered, his counsel moved to quash the indictment on the following grounds:—

(a) The grand jury having had an indictment laid before them and having considered the same and having found a true bill thereupon, that this indictment so found was bad, inasmuch as it was not found on legal evidence and should, therefore, have been quashed. My view was that the first action of the grand jury was a nullity.

*Also reported 16 B.C.R. 326.

(b) That even although the grand jury could bring in a second true bill on the same indictment after having acted as above set out, it should be quashed on the ground that the grand jury, having had depositions before them, were not qualified to deal with the said indictment again, on account of the fact that their minds would be prejudiced by evidence not being legal evidence.

(2) I refused the motion to quash, and upon the trial of the prisoner, he was found guilty on the first count on the indictment, and was sentenced to five years in the penitentiary at New Westminster, with hard labour.

(3) The questions of law arising on the above statement for the opinion of this Court therefore are:—

(a) Whether the grand jury, having returned a true bill without having called any witnesses, and merely on a perusal of the depositions, could afterwards return to the grand jury room and reconsider their finding and return another true bill on the same indictment, after having called witnesses.

(c) Whether depositions taken on the preliminary hearing should be submitted to the grand jury.

(d) That if the grand jury could find a second true bill on the same indictment, whether such indictment should be quashed on the ground that the grand jury had read the depositions taken on the preliminary hearing.

(e) If the Court should be of the opinion that the true bill on the indictment was such a bill as entitled the Crown to place the accused on his trial, then the said conviction is to stand, but if the Court should be of opinion to the contrary, then said conviction should be quashed.

VANCOUVER, November 9, 1911.

S. S. Taylor, K.C., for accused:—It is submitted that a grand jury in the circumstances here could not hear evidence after having come to a decision on other, and that even improper, evidence. The duty of the Crown was to have either traversed the case to the next assizes, or else summon a new grand jury. *Rex v. Walker* (1910), 16 Can. Cr. Cas. 77, 15 B.C.R. 100, is, by analogy, in support of this submission.

[MACDONALD, C.J.A., referred to *Allen v. The King* (1911), 44 Can. S.C.R. 331, 18 Can. Cr. Cas. 1.]

Maclean, K.C., for the Crown:—*Rex v. Walker*, 16 Can. Cr. Cas. 77, 15 B.C.R. 100, is strongly in support of the submission that the true bill was properly brought in. Here the matter had been withdrawn from the grand jury, and they had been directed to consider the question entirely afresh.

He was stopped.

PER CURIAM:—The application should be refused. It was the duty and the province of the trial Judge to decide, on the facts of the case, whether or not it would be just to the prisoner to send the grand jury back with instructions to eliminate from their minds any wrong evidence which they had considered, and to bring in a bill on proper evidence. We think the learned Judge exercised his discretion properly, and we ought not to interfere.

Motion dismissed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE GARROW, MACLAREN, MEREDITH, AND MAGEE, JJ.A., AND
LENNOX, J.

THE KING v. PILGAR.

1. JURY (§ II B—58) — BIAS — INTEREST — INTERROGATING JURY — PREMATURE APPLICATION.

A request by defendant's counsel, in a criminal trial for arson, made at the opening of the trial, that before the jury was called he would like to ask each of the men who are called whether he is interested in a certain insurance company, which interest on his part would have made him ineligible to serve, is prematurely made.

2. JURY (§ II B—55)—EMPANELLING — COMPETENCY OF JUROR — CHALLENGE—TIME FOR.

After a jury is empanelled and sworn it is too late to challenge for cause.

3. JURY (§ II A—50)—COMPETENCY OF JUROR—PREMATURE APPLICATION TO CHALLENGE JURY—STATEMENT BY JUDGE NOT AMOUNTING TO REFUSAL OF RIGHT TO CHALLENGE.

Where defendant's counsel, in a criminal action, makes a premature application that he be allowed to interrogate the jury on a question

involving their eligibility to sit, a ruling by the judge in these words, "We will see when the question arises," while it might give rise to a wrong impression on the part of counsel that the court would later do the questioning, does not, however, amount to a refusal of the defendant's right to challenge for cause, where the defendant's counsel allowed the jury to be sworn before renewing his application.

4. APPEAL (§ I C—25)—CRIMINAL CASES — APPEAL — OTHER REMEDY — STATED CASE.

The Ontario Court of Appeal, on a criminal appeal, has no jurisdiction to intervene in a case of error or misunderstanding, its jurisdiction being limited by section 1014 of the Criminal Code in a stated case to questions of law; the application for relief in a case of error or misunderstanding being to the Minister of Justice, under sec. 1022 of the Criminal Code (1906).

DECIDED: November 19, 1912.

THE defendant was tried for arson at the Halton Sessions before the County Court Judge and a jury, and found guilty. The Judge reserved two questions for this Court, which, with the facts upon which they are based, are set forth by him in the stated case as follows:—

"At the opening of the trial and after the defendant had pleaded 'not guilty,' the following conversation took place between counsel for the defendant and myself:—

"MR. CAMERON: Before they call the jury I would like to ask each of the men who are called whether they are interested in the Halton Mutual Fire Insurance Company. If any of them are interested in that company I submit they would not be eligible to sit on this jury.

"HIS HONOR: We will see when the question arises.

"MR. CAMERON: Of course, I cannot tell without asking them.

"The clerk of the Court then proceeded with the calling of the jurors. At my request the clerk asked to stand aside several of the jurymen who had served on a jury the previous day and counsel for the defendant challenged some five jurors peremptorily. The jury was empanelled and sworn. The following conversation then took place between counsel for the defendant and myself.

"MR. CAMERON: Would your Honor see if any of the jury are interested in the Halton Mutual Fire Insurance Company. _

"HIS HONOR: It is too late, Mr. Cameron; I was waiting for it; that would be a good challenge for cause.

"Exhibit 8 shews that the Halton Mutual Fire Insurance Company was actively engaged in prosecuting the Fire Inquest in connection with the burning of buildings for the burning of which the charge of arson was laid herein and the affidavit of John Wilson Elliott shews that some of the jurymen who tried the defendant were interested in the Halton Mutual Fire Insurance Company.

"I have reserved for the opinion of this Honourable Court the following questions:—

"1. Was the request of the defendant's counsel to examine the men called to serve on the jury which was to try the defendant made at the proper time, and at the time when the question of their interest in the Halton Mutual Fire Insurance Company arose?

"2. Did what took place between counsel for the defendant and myself and prior to the empanelling of the jury which tried the defendant amount to a refusal of the defendant's right of challenge for cause?"

The questions reserved were answered in the negative, *MEREDITH, J.A.*, dissenting.

D. O. Cameron, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MACLAREN, J.A. (after setting out the facts as above):—There is no suggestion that the usual caution was not given to the accused by the clerk of the Court before the jurors were sworn in the prescribed formula: "Prisoner, these good men whose names you shall hear called are the jurors who are to pass between our sovereign lord the King and you upon your trial: if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn and you shall be heard." See Archbold (24th ed.), p. 207; Taschereau, p. 779.

His counsel had no right to interrogate or ask any juror any

question without challenging him for cause: Archbold, p. 213. The first application, if application it can be called, was premature, as it was made before the jury were called. The second was too late, as it was made only after the jury were sworn, when the Judge had no power to grant it.

The first question must, therefore, be answered in the negative.

As to the second question, I do not see how it can be said that what took place between the Judge and counsel before the empanelling of the jury can be said to amount to a refusal of the defendant's right to challenge for cause. It was a statement that the point would be dealt with when it arose, the Judge apparently being under the impression that counsel would challenge for cause any juror whom he suspected, but did not know, to be a member of the Mutual Insurance Company in question. It would appear that counsel misunderstood his Honour's expression, "We will see when the question arises," and interpreted the use of the "we" as an intimation that his Honour would do the questioning. As counsel did not challenge any juror at the proper time it may be that the Judge thought that he knew that none of the twelve who were sworn were members of the Mutual Insurance Company in question. As I have said, I do not think it can be construed into a refusal of the right to challenge for cause, and in my opinion the second question must also be answered in the negative.

By section 1014 of the Criminal Code it is provided that it is only questions of law that can be reserved for this Court in a stated case, and we must answer them strictly as we understand the law to be. We have no authority or jurisdiction to intervene in a case of error or misunderstanding. Section 1022 of the Code indicates where application for relief should be made in such cases, namely, to the Minister of Justice.

GARROW, and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The formal questions submitted for the opinion of this Court must be read in connection

with the rest of the stated case, and must be given a reasonable interpretation with a view to meeting the real points of the case, and a strictly literal interpretation which would answer no useful purpose ought not to be applied to them, if they are fairly open to an interpretation which would meet the real needs of the case.

To interpret the questions in this case as meaning: is it regular to object to a juryman, for cause, before he is called; and did the Judge refuse to entertain an objection at the time, when the objection ought to have been made, would be to consider the reservation of this case a futile proceeding and a mere waste of time; which I am quite sure no one could have meant.

That which the Judge must have desired to know was whether he had, by his conduct, in any way deprived the prisoner of the opportunity to prevent persons disqualified by interest trying him upon the very grave charge made against him, and of which the jury found him guilty; if, therefore, the questions are capable of an interpretation which will enable this Court to consider such real point, and enable it to do justice in the case, they ought to be so understood and acted upon.

It is quite clear that counsel for the prisoner was not familiar with the practice in criminal cases; but he plainly intimated, at the outset, that he desired to guard against anyone disqualified by interest acting as a juryman; and in the acknowledgment of that desire, it ought to be needless to say, he ought to have had every reasonable assistance that the Court could give.

Then what happened? At the very outset the Judge was made aware of a possibility of some of the jurymen being disqualified by personal interest; and upon being made aware of that fact said: "We will see when the question arises." Not: "You are premature, you must raise the question at the proper time." If he had said that he would probably have been asked to say when the proper time would be; and counsel would have raised the question again at the proper time. It would not be

unreasonable for the prisoner, or for his counsel to rest assured, after the Judge had said, "We will see when the question arises," that the Court would see at the proper time that opportunity for enquiry as to disqualification of jurors was afforded. Having regard to the duty of the Court to take great care that the prisoner got a fair trial, what else could the Judge's answer to counsel, obviously unfamiliar with the practice in this respect, mean? When the proper time came "we"—whether he meant the Court, or the Judge and counsel—did not "see" to it and consequently the man was deprived of his right of objection to any juror for cause, and so may have been tried by jurors disqualified by interest.

What took place obviously deprived the prisoner of the right of challenge for cause; and that which the Judge said was plainly the cause of that deprivation, and so I think it may be said, fairly, that which took place did amount to a substantial refusal of the right of challenge for cause. Counsel is not to be substituted for prisoner; neither the point, nor the question, is: was counsel refused? The point and the question is: Did all that took place amount to a refusal of the intended challenge? No one would call it incorrect to say that it amounted to a denial of the right; and surely that is equivalent to a refusal in the sense in what this case is stated for our opinion.

I cannot, but think and say, that it was plainly the duty of the Court under all the circumstances to have taken great care that a jury of disinterested jurors only was empanelled; to wait until it was too late to object, before saying anything, may very well have misled the prisoner out of his right, and was, in my opinion, an error on the part of the Court as well as of counsel.

I answer the first question, No: It is not a question which should have been reserved, for it is one about which there could be no reasonable doubt.

And my answer to the second question is: Yes, substantially.

And accordingly I would direct a new trial.

LENNOX, J.:—The answers to both questions reserved should be "No." But at the same time I desire to add, with the greatest respect, that, in my opinion, it would have been much more satisfactory if the learned County Court Judge, knowing of the desire and intention of the prisoner's counsel, had, when the proper time for challenge was reached, then called counsel's attention to the matter, and afforded him an opportunity of exercising his undoubted right. I am sure the learned trial Judge will agree with me that whatever may be the presumption as to the prisoner's guilt or innocence, and whether he is defended with skill and judgment or the reverse, it is always the duty of the presiding Judge to see to it that nothing shall prevent the prisoner from having a fair trial and British justice.

Questions answered in the negative,

MEREDITH, J.A., *dissenting.*

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